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Law of Common Carriers, Abridged

The Common and Statutory Law of Common Carriers
State Regulation of Railroads

Prepared under the direction of the *Advisory Traffic Council of The American Commerce Association*

By EDWARD J. MARTIN, LL. B.

ELVIN S. KETCHUM, A. B., Pd. M.
Editor-in-Chief
Originator of Systematic and Scientific Training
in Practical Traffic Work

EDWARD G. WARD
Editorial Director
Former President and Editor-in-Chief of the Railway World; also formerly with the Interstate Commerce Commission; also with the U. S. Department of Agriculture as Transportation Expert and with the U. S. Department of Commerce and Labor as Internal Commerce Expert.

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PREFACE

ALL transportation and functions of common carriers are not controlled by the Act to Regulate Commerce and other federal legislation. There are forms of transportation and corporate rights, responsibilities and duties of carriers, which do not come within the purview of the national system of regulation.

The Act to Regulate Commerce was intended by Congress to afford an effective and comprehensive means for redressing wrongs resulting from unjust discrimination and undue preferences by carriers, as these wrongs affected interstate commerce. In short, its definement is essentially limited to securing just and reasonable charges for transportation, prohibiting unjust discriminations, preventing undue or unreasonable preferences, and abolishing combinations between carriers for the pooling of freights. It does not, however, enter the domain of the common law control of corporate rights of carriers, their contractual responsibilities to shippers whose property is in course of transportation, or the duties devolving upon carriers in the rendition of transportation services not within the jurisdiction of the Act.

There is no federal common law distinct from the common law of England, which latter customary system of law has been adopted by our several states and modified by their own statutes as needs have required. And so, to those laws of the states, except where the Constitution, treaties or statutes of the United States otherwise require or pro-

vide, we must turn for the rules of decision in trials at common law affecting those rights and responsibilities existing between carriers and shippers which are not embraced within the scope of the authority of the Act to Regulate Commerce and its amendatory and supplementary laws.

In this volume has been prepared a compendium of the common and statutory law—the laws of the states—as rules of decision, for the ready use of the traffic man and the shipper, in solving the various legal problems of commercial transportation.

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CHAPTER I.

CARRIERS OF GOODS.

The Law of Common Carriers Abridged

CHAPTER I.

CARRIERS OF GOODS.

§ 1. Carriers Defined—General.

The duties, obligations and rights of carriers and owners of property carried, arise out of the law of bailment. Bailment is a delivery of goods or personal property by one person to another in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, the bailee being bound to either re-deliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.[1] Bailees of goods for carriage are carriers. Such carriers are of three kinds,—private carriers without hire or reward, private carriers for hire, and common or public carriers for hire.[1a]

One who carries the goods of another without hire or reward is a private carrier. But a carrier may perform the carriage of goods for hire and still remain a private carrier because he makes no public confession that he will carry for all who apply.[2]

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(1) Black's Law Dict., tit. "Bailment."

(1a) Varble vs. Bigley, 14 Bush. (Ky.) 698, 29 Am. Rep. 435.

(2) Moore on Carriers, 2d ed., Vol. I, chap. I, secs. 1 and 2, pp. 1 and 2; Hutchinson Carriers, 2d ed., Vol. I, chap. II, secs. 15 and 16, pp. 14 to 16; Bouvier's Law Dict., Vol. I. 242; Parsons on Contracts, Vol. I, 242; Black's Law Dict., tits. "Bailment" and "Carrier"; Story

§ 2. Private Carriers Defined.

Private carriers are of two kinds, viz.: those who carry without hire or reward, and those who carry for hire. A carrier is a private carrier or a common carrier according as he publicly confesses or not the business of carriage. If he does not publicly confess the business of carriage, then he is a private carrier. And if he performs the service of carriage without hire or compensation, he is a gratuitous bailee and therefore a gratuitous private carrier. But if he performs the service for hire or compensation he is a private carrier for hire, with the sole restriction to his responsibility that he does not hold himself out to carry for all who may apply.

This classification of carriers is not without worthy purpose in the law. Neither carriers without hire or other reward or other private carriers are, as to their responsibility, in anywise distinguishable from other ordinary bailees. The extent of responsibility to the owners of the goods is limited by their status as private or public carriers. Even one engaged in the business of a common carrier may carry the goods of another, if he chooses, without compensation. His act then is one of mere gratuity and by such act he becomes, as to the particular goods, a private carrier. So the carrier which accepts the goods to be carried without charge, because of any motive of friendship or charity, or from any consideration which the law does not regard in the light of pecuniary or valuable compensation, becomes responsible to the owner of the goods carried only as an ordinary bailee, termed in the law of bailment, a mandatary. This class of private car-

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on Bailments, sec. 495; American & English Encyclopedia of Law, Vol. V, sec. 1, Vol. VI, 364.

See also: The Cape Charles, 198 Fed. 346; Samms vs. Stewart, 20 Ohio 69, 55 Am. Dec. 445; Johnson vs. Pensacola, etc., R. R. Co., 16 Fla. 623, 26 Am. Rep. 731, 735; McBurnie vs. Stelsly, 29 K. L. Rep. 1191, 97 S. W. 42.

riers comprises those who undertake to carry for others for the latter's convenience or accommodation in the acceptance of sums of money or articles of value which are to be kept with the person of the carrier and delivered according to the request of the sender.

Hence, it is obvious that the class to which a particular carrier belongs depends upon the nature of his business, the character in which he holds himself out to the public, the terms of his contract, and his relations generally to the parties with whom he deals and the public.

A private carrier for hire is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for compensation or reward. Such carriers are not common carriers because they do not make the carriage of goods for others a business, and do not hold themselves out to the public as ready and willing to carry indifferently for all persons, a particular class of goods or goods of any kind whatever, and never having professed this course of business, private carriers may refuse at will to carry the goods which may be offered, without incurring any liability whatever.[3]

§ 3. Common Carriers Defined.

The advent of the steam locomotive and steamboat had the effect of greatly decreasing the number of private carriers engaged in performing the transportation service of the commercial world. A great multiplication of common carriers has since transpired and their routes now transverse almost every section of the country, offering greater security and facilities in transportation.

A common carrier is one who publicly undertakes, as a business, to carry from one place to another, for hire or

(3) Pennewell vs. Cullen, 5 Harr. (Del.) 238; Piedmont Mfg. Co. vs. Railroad, 19 S. C. 353.

reward, the person or the goods of the kind which he professes to carry of all persons who may apply for such carriage. In other words, a common carrier is one who holds himself out to the public to carry persons or freight for hire. The person applying to the common carrier for his service of carriage must agree to have his person or goods carried upon the lawful terms of the carrier, who, if he refuses to accept and carry such person or goods, for any person who is willing to comply with his terms, renders himself liable in an action at law by the aggrieved party.

At common law, a common carrier is an insurer of the goods entrusted to him, and he is responsible for all losses of the same save such as are occasioned by the act of God or the public enemy.

The employment of a common carrier is a public one. He assumes a public duty and the law holds him bound to receive and carry the person or goods of any one who offers, provided, in the latter case, the goods be of the kind he professes to carry. It is not essential, in order that a person may constitute himself a public or common carrier, that he owns the means of transportation, the contract of carriage, agreeing to transport and deliver, being sufficient to establish a status. "According to all the authorities," said Moore in his treatise on the Law of Common Carriers," the essential characteristics of the common carrier is that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment be such that, if he refuse, without some just grounds, to carry goods for anyone, in the course of his employment and for a reasonable and customary price, he will be liable to an action. The nature and extent of the employment

and business in which he holds himself out to the public, either expressly or impliedly, as engaged, furnish the true limits of the rights, obligations, duties and liabilities of the common carrier. The chief distinction between common carriers and all others rise in the fact that, in respect to the extent of their responsibility and the liability they assume in their undertaking, they effectually insure the safe transportation and delivery of the goods they carry, and are made liable, by reason of the public nature of their employment and the responsibility imposed upon them by the law upon the grounds of public policy, for loss or injury from whatever cause arising, excepting only acts of God and the public enemy, and in the further fact that, as public or common carriers for hire, they are obliged by law to carry for all persons indifferently. * * * To constitute one a common carrier it is necessary that his exclusive business shall be carrying. It has been held that in order to constitute one a common carrier, the business of carrying must be habitual and not casual; and, to the contrary, the one who carries goods for hire contracts the responsibility of a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. The rule has been laid down that one who undertakes, for a reward, to carry produce or goods of any sort from one place to another, becomes thereby a common carrier; and that the distinctive characteristic of a common carrier is that he transports goods for hire for the public generally, and it is immaterial whether this is his usual or occasional occupation, his principal or subordinate pursuit." [4]

(4) Moore on Carriers, 2d ed., Vol. I, chap. II, sec. 1; Hutchinson Carriers, 3d ed., Vol. I, chap. III, secs. 47, 48 and 49, pp. 41 to 44; Chitty on Carriers, tit. "Common Carriers"; 2 Kent. Com. 598; Story on Cont., sec. 752a; Gordon vs. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; Dwight vs. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec.

Judge Story, in his work on Bailments, sec. 495, says, "To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as his business, not as a

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133; Allen vs. Sackrider, 37 (N. Y.) 341; Mershon vs. Hopensack, 22 N. J. L. 377; Verner vs. Sweitzer, 32 Pa. St. 208; Varble vs. Bigley, 14 Bush. 698; Schloss vs. Wood, 11 Col. 287; Lang vs. Brady, 73 Conn. 707, 49 Atl. Rep. 199; Railway Co. vs. Lippman, 110 Ga. 665, 36 S. E. Rep. 202, 50 L. R. A. 673; Bassett & Stone vs. Mining Co., 88 S. W. Rep. 318.

Nugent vs. Smith, L. R. 1, C. P. Div. 19 and 423, as reported in Hutchinson Carriers, and referring to the case of Fish vs. Chapman, 2 Ga. 349, "as 'a powerful and business-like judgment,' proceeded to say that 'the real test whether a man is a common carrier, whether by land or water, therefore, really is, whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried. If he does this, his first responsibility naturally is that he is bound by a promise, implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation. This responsibility is not one adopted from the Roman law on grounds of policy; it arises according to the general principles which govern all implied promises. And his second responsibility, which arises upon reasons of policy, is that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy; it would be without reason; many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers, because when the common law adopted that policy the business of common carriers in England was exercised in a particular manner and subject to particular conditions which called for the adoption of that policy.'"

See also: Propeller Niagara vs. Cordes, 21 How. (U. S.) 7, 16 L. Ed. 41; Railroad Co. vs. Lockwood, 17 Wall. (U. S.) 357, 377, 21 L. Ed. 627; Liverpool, etc., Steamboat Co. vs. Phenix Ins. Co., 129 U. S. 397, 440, 32 L. Ed. 788; U. S. vs. Sioux City Stock Yards Co., 162 Fed. 556, affirmed 167 Fed. 126; United States vs. Ramsey, 116 C. C. A. 568, 197 Fed. 144.

casual occupation **pro hac vice.** The common carrier has therefore been defined to be one who undertakes for hire or reward to transport the goods of such who choose to employ him, from place to place."

It would seem that the declaration in **Nugent** vs. **Smith,** which was handed down by Judge Brett in 1875, and the definitions of such accepted offers as Moore, Hutchinson, and Story, are in conflict. And it is quite true that what circumstances will be sufficient to invest the employment of the carrier in particular cases with the character of a public one, as well as what professions or course of dealing on his part are sufficient to constitute him a common carrier as distinguished from a private carrier for hire, have frequently been a difficult question for the courts to decide and have given rise to considerable diversity of judicial opinion. The effect of statutory definition must be considered in this respect. To illustrate, the statute of New York state declares that every railroad corporation doing business in the state shall be a common carrier. Any one or two or more corporations owning or operating connecting roads within the state, or partly within and partly without the state, are held liable as a common carrier for the transportation of passengers or delivery of freight by it or them, to be transported by it or them, to any place on the line of a connecting road. "And if it shall become liable to pay any sum by reason of neglect or misconduct of any other corporation, it may collect the same of the corporation by reason of whose neglect or misconduct it became liable." [5]

In Georgia any person undertaking to transport goods to another place for compensation is a carrier. One who pursues the business constantly or continuously for any

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(5) The Railroad Law of New York, sec. 28.

period of time or any distance of transportation is a common carrier.[6]

The California statute declares that everyone who offers to the public to carry persons or property, or messages, except only telegraph messages, is a common carrier of whatever he thus offers to carry.[7]

The Nebraska law defines a common carrier to be a corporation, etc., owning, managing, or controlling a railroad, etc., or any express company, car company, sleeping-car company, and freight line company, telegraph and telephone companies, and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire, and that "any other carrier engaged in the transportation of messages or transportation of passengers or freight for hire," means only such companies as by their public profession hold themselves out as engaged in transmitting messages or transporting passengers or freight for hire, and as willing to perform such services for any person having occasion to employ them.[8]

No better distinguishment of the numerous cases defining the test of status of private and common or public carriers can be found than in Hutchinson's treatise on the Law of Carriers. Speaking to this point, Judge Hutchinson says:

> "The criterion by which it is to be determined whether he belongs to the one class or the other is generally considered to be, whether he has held himself out or has advertised himself in his dealings or course of business with the public as being ready and willing, for hire, to carry particular classes of goods

(6) 2 Ga. Code, 1895, secs. 2263, 2264.
(7) Cal. Civ. Code, 1886, sec. 2168.
(8) Neb. Laws, 1907, p. 320, chap. 90, sec. 4. See also, State vs. Union Stock Yards Co. of Omaha, 115 N. W. 627 (1908).

for all those who may desire the transportation of such goods between the places between which he professes in this manner his readiness and willingness to carry. If he has done so, he is of course to be regarded as a common carrier; but if not, he will be treated only as a private carrier for hire.

This, however, seems not to be the universal test; and some of the cases upon this subject in this country have denied the necessity for any public profession or undertaking, in order to impose upon the carrier the character and the consequent liability of the common carrier, and have held that one who has never assumed the character of a public carrier, and although his contract to carry may be confined to the one particular instance or pro hac vice, as it is termed, may assume, thereby, all the responsibility of the common carrier, if he and the class of carriers to which he belongs have been in the occasional habit of accepting the goods of others for transportation for hire. The leading case upon this theory of the responsibility incurred by such carriers is that of Gordon vs. Hutchinson, which carries the great weight of the authority of C. J. Gibson, who delivered the opinion of the court in favor of that view of the question under the circumstances of difficulty which then existed in the carrying business of this country. In this case, the defendant, who was a farmer, applied at the store of the plaintiff, to be employed to haul a load of goods for him, from Lewistown to Bellefonte, on his return from the former place, to which he was going with a load of iron. He received an order from the plaintiff and loaded the goods upon his wagon for his return trip. On the way, the head came out of a hogshead of molasses and it was wholly lost. An action was brought against the carrier for its value, and it was held that the farmer, under the circumstances, had made himself in this service a common carrier and was liable as such.

"It was, however, admitted that the rule was different in England, and the decision was rested entirely

upon the difference in the occupations of the people and in the means of transportation. 'Rules,' it is said, 'which have received their form from the business of a people whose occupations are definite, regular and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current prices, but it will not be thought that he is bound to do so here. In England, the obligation to carry at request, upon the carrier's particular route, is the criterion of the profession; but it is certainly not so with us. * * * The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him. There was nothing special in the case. On the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility.' And the same judge, in the case of Steinman vs. Wilkins, speaking of the common carrier, observed that in England he was bound by the custom of the realm to carry for all employers, 'but it is by no means certain,' said he, 'that our ancestors brought the principle with them from the parent country as one suited to their condition in a wilderness. We have no trace of an action for refusing to carry, and it is notorious that the wagoners, who were formerly the carriers between Philadelphia and Pittsburg, frequently refused to load at the current price." [9]

In the Tennessee cases of **Moss** vs. **Bettis**, 4 Heisk. 361; **Craig** vs. **Childress**, Peck. 270; **Johnson** vs. **Friar**, 4 Yer. 48; **Gordon** vs. **Buchanan**, 4 Yer. 71, and **Tourney** vs. **Wil-**

(9) Hutchinson Carriers, 3d ed., chap. III, secs. 49, 50 and 51.

son, 7 Yer. 340, the same rule was sustained by the Tennessee courts. It may be said that this exception by the Tennessee courts to the common law, which brought into the family of common carriers a class which does not properly belong there, was largely confined to carriers by river craft, and to have been first made because the prevalence of this mode of transportation seemed to make it necessary that such carriers should be held to a stricter accountability than mere private carriers. Elsewhere these exceptional cases have not been followed, and the carrier has been subject to the extraordinary liability of the common carrier only when it has been shown that by his profession, or previous course of business, he has held himself out as such a carrier.[10]

The rule may therefore be best stated that the distinctive characteristic of a common carrier is that he transports goods for hire for the public generally. Whether that is his usual or occasional occupation, his principal or subordinate pursuit, may be immaterial,[11] but the existence of the duty to accept and carry is paramount.

And so we find the Supreme Court of the United States, in one of its latest decisions relating to the subject, in full accord with the principle that the true test of the character of a carrier is his legal duty and obligation with reference to transportation. In the Tap Line Cases, the Supreme Court adhered to the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. "It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which

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[10] Hutchinson Carriers, 3d ed., Vol. I, chap. III, secs. 52, 53, 54, 55, 56, 57 and 58, pp. 47 to 56.

[11] Tap Line Cases, 234 U. S. 1, 58.

is the real criterion determinative of its character." This principle has been frequently recognized by the courts.[12]

In the Tap Line Cases, the Supreme Court held that although a railroad may have originally been a mere plant facility, after it has been acquired by a common carrier duly organized under the laws of the state and performing services as such and regulated and operated under competent authority, it is no longer a plant facility but a public institution, even though the owner of the industry of which it formerly was an appendage, is the principal shipper of freight thereover.

Upon this point the Court said:

> "Futhermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the state. They are so treated by the public authorities of the state, who insist in this case that they are such and submit in oral discussion and printed briefs cogent arguments to justify this conclusion. They are engaged in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the state of their corporation. They were treated and dealt with as common carriers by connecting systems of other carriers, a circumstance to be noticed in determining their true character. **U. S.** vs. **Union Stock Yards & Transit Co.,** 226 U. S. 286. They are engaged in transportation as that term is defined in the Commerce Act and described in the decisions of this court. **Coe** vs. **Errol,** 116 U. S. 517; **Covington Stock Yards Co.** vs. **Keith,** 139 U. S. 128; **Southern Pac. Term. Co.** vs. **Interstate Com. Comm.,** 219 U. S. 498; **U. S.** vs. **Union Stock Yards Co., supra.**
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> "Applying the principle which we have stated as determinative of the character of these roads and

(12) Tap Line Cases, 234 U. S. 1, 58; Union Line Co. vs. Chicago & Northwestern Ry. Co., 233 U. S. 211.

without repeating the facts concerning them, they would seem to fill all the requirements of common carriers so employed, unless the grounds upon which they were determined not to be such by the Commission are adequate to that end. The Commission itself as to all shippers other than those controlled by the so-called proprietary companies, treated them as common carriers, for it has ordered the trunk lines to re-establish through routes and joint rates as to such traffic." [13]

§ 4. Kinds of Common Carriers.

Common carriers of goods are elementarily classified as land carriers and water carriers.

A distinguishment may properly be made between common carriers of general goods and merchandise, and those engaged in the carriage of live stock and perishable property. This differentiation arises out of the fact that the common law liability of a carrier may be limited by the intrinsic character of or defect in the subject matter of the contract. In all respects the common law responsibilities of the carrier attach to one who undertakes the carriage of living animals except as to the damage caused by the conduct or propensities of the animals themselves. And the same principle applies with equal force to contracts for the carriage of perishable property, for the carrier is not liable for injuries caused by the intrinsic defects of perishable property, even though the carrier is bound to take reasonable means to guard against such

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[13] Tap Line Cases, 234 U. S. 1, 58.

See also: Johnson vs. Pensacola, etc., R. R. Co., 16 Fla. 623, 26 Am. Rep. 731; Ill. Cent. R. R. Co. vs. Frankenburg, 54 Ill. 88, 5 Am. Rep. 92; Elkins vs. Boston, etc., R. R. Co., 23 N. H. 275; Fish vs. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Spears vs. Lake Shore, etc., R. Co. (N. Y.), 67 Barb. 513; U. S. Express Co. vs. Backman, 28 O. St. 144; Cleveland, etc., R. Co. vs. Henry, 170 Ind. 94.

injuries, mainly by using special diligence to avoid delay in transportation.[14]

See also "Carriers of Live Stock, chap. XI, this volume, post.

§ 5. Carriers of Passengers.

Carriers of passengers are not common carriers as to the person of those whom they carry.[15]

The carriage of persons and of goods are usually combined employments engaged in by the same carrier, and as to the baggage of passengers, the carrier of passengers become a common carrier thereof.

A carrier of passengers is distinguished from a carrier of goods not only as to the extent of his liability, but also from the nature of his contract. The carriage of goods is a bailment, and the liability arising therefrom for injuries to the goods is the liability arising out of the contract. The carriage of passengers is not a bailment, and the liability of the carrier for injuries to his passengers depends entirely upon his negligence, and arises out of a public duty to carry safely imposed by law. If the term "common carrier of passengers" is to be used, then it must mean one who undertakes to carry for all persons indifferently who may apply for passage. To that extent the term may be quite correctly used. The necessity for a distinction between a common and a private carrier of passengers is because it is the duty of common carriers of passengers to carry all who may apply for passage. But the distinction as to the extent of liability of the carrier of passengers and the common carrier of goods arises out of the differ-

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(14) Moore on Common Carriers, 2d ed., Vol. I, chap. II, secs. 3 and 4, pp. 31 to 35.

(15) Hutchinson Carriers, 3d ed., Vol. I, chap. III, sec. 93, pp. 89 and 90.

ence in relationship existing between the owner of goods transported and a person who is carried as a passenger.[16]

Moore on Common Carriers, writing of the subject of liability of carriers of passengers, says:

> "Carriers of passengers are common carriers in respect to the baggage of their passengers and also in respect to their passengers and those desiring passage on their conveyances, but their liability to passengers for personal injuries is limited to cases where their negligence in the performance of their duties is the approximate cause of the injury; they are not insurers of the safety of their passengers. A carrier of passengers who undertakes to carry goods for hire subjects himself to the liability of a common carrier of goods, in respect to such goods, except where the compensation is so grossly inadequate as to render the application of such a rule of liability unjust; in such a case he is liable merely as a bailee." [17]

This states the rule with slightly less care than has been used by other authors in making this distinguishment

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[16] Am. & Eng. Encyl. of Law, 2d ed., Vol. V, tit. "Carriers of Passengers," chap. I, pp. 480 and 481; Boyce vs. Anderson, 2 Pet. (U. S.) 155; Rock vs. McDonald, 4 McCord L. (S. C.) 223; McClenaghan vs. Brock, 5 Rich. L. (S. C.); Ansell vs. Waterhouse, 2 Chit. Rep. 1, 18 E. C. L. 227; Bretherton vs. Wood, 3 Brod. & B. 54, 7 E. C. L. 345; Tattan vs. Great Western Ry. Co., 2 El. & El. 844, 105 E. C. L. 844; Collett vs. London, etc., Ry. Co., 6 Eng. L. & Equ. (305); Philadelphia, etc., R. R. Co. vs. Derby, 14 How. (U. S.) 468; Nolton vs. Western R. R. Corp., 15 N. Y. 444, 69 Am. Dec. 623; Christie vs. Griggs, 2 Camp. 79; Crofts vs. Waterhouse, 11 Moore 133; Stokes vs. Salton Stall, 13 Ped. (U. S.) 191; Chicago, etc., R. R. Co. vs. Carroll, 5 Ill. App. 201; Grand Rapids, etc., R. R. Co. vs. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Bennett vs. Dutton, 10 N. H. 481; Camden, etc., R. R. Co. vs. Burt, 13 Wend. (N. Y.) 626, 28 Am. Dec. 488; Caldwell vs. Murphy, 1 Duer. (N. Y.) 233; Pittsburgh, etc., R. R. Co. vs. Hinds, 53 Pa. St. 512, 91 Am. Dec. 224; East Tennessee, etc., R. R. Co. vs. Mitchell, 11 Heisk. (Tenn.) 400; Gillingham vs. Ohio River R. R. Co., 35 W. Va. 595, 29 Am. St. Rep. 827; Angell on Carriers, sec. 524; Bouv. Law Dict., tits. "Common Carrier of Passengers," "Common Carriers"; Nashville, etc., R. R. Co. vs. Messino, 1 Sneed (Tenn.) 220; Verna vs. Sweitzer, 32 Pa. St. 208.

[17] Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 8, p. 38.

between common carriers of goods and carriers of passengers. It is entirely consonant, however, in terms with the principle heretofore stated, that carriers of passengers are only liable to passengers for personal injuries proximately caused by the negligence of the carrier in the performance of its duties.[18]

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[18] Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 8, p. 38; Bean vs. Sturtevant, 8 N. H. 146, 28 Am. Dec. 389.

CHAPTER II.

WHO ARE COMMON CARRIERS.

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§ 1. Railroad Companies.

Whether a particular railroad is a common carrier involves both questions of law and of fact. A railroad is defined as a road or way on which iron or steel rails are laid for wheels to run on, for the conveyance of heavy loads in cars or carriages propelled by steam or other motive power. Whether or not this term includes roads operated by horsepower, electricity, cable lines, etc., depends upon the context of the statute in which it is found. The decisions on this point are at variance.[1]

The courts take judicial notice of the fact that a railroad company is a common carrier where a statute declares it to be such, but, generally speaking, railroad companies are, by their very nature and organic character, common carriers, whether made so by a general statute or by their charters, or not, because engaged in public employment affecting the public interests. As such they are subject to legislative control as to charges, the same as any other common carrier. Railroad carriers of both passengers and freight are subjected with full vigor to the rules of responsibility of common carriers and of passenger carriers.[2]

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(1) Black's Law Dict., tit. "Railroads."

(2) Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 10, pp. 40 to 44; Caldwell vs. Richmond, etc., R. R. Co., 89 Ga. 550; Denver, etc., R. R. Co. vs. Cahill, 8 Colo. App. 158; Laurel Fork, etc., R. R. Co. vs. West Virginia Transportation Co., 25 W. Va. 324; West Virginia Transportation Co. vs. Sweetzer, 25 W. Va. 434.

See Michie on Carriers, Part I, chap. I, sec. 3, to effect that railroad companies are common carriers of both persons and property, citing cases in footnote 19.

In consideration of their being public utilities as well as private enterprises, railroads have been endowed with extensive rights and franchises together with the right of eminent domain. They have been fostered by the government and have practically monopolized the land carriage of the country, and in their dealings with the public are properly held to that strict accountability which the public safety and policy require.[3]

Referring to the case of Norway Plains Company vs. the Railroad, supra, Hutchinson, in his work on Carriers, states this to be the law which has been everywhere held with the most perfect unanimity.[4]

If a railroad company not fully completed and formally opened for business, undertakes to carry in the usual way, the responsibilities of a common carrier attach.[5]

So a private individual operating a railroad is a common

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(3) Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 10, pp. 41 to 44; Hutchinson Carriers, 3d ed., chap. III, sec. 76, pp. 72 to 75; Thompson, etc., Electric Co. vs. Simon, 20 Or. 60, 25 Pac. Rep. 147; Thomas vs. Boston, etc., R. R. Co., 10 Met. 472; Rogers Locomotive Works vs. Railroad, 5 C. E. Green (N. J.) 379; Root vs. The Railroad, 45 N. Y. 524; Elkins vs. The Railroad, 3 Foster 275; Railroad Company vs. Queen City Coal Co., 13 Ken. Law Rep. 832; Memphis News Publishing Co. vs. Railway Co., 110 Tenn. 396, 75 S. W. Rep. 941, 63 L. R. A. 150; Norway Plains Co. vs. The Railroad, 1 Gray 263, holding "that railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law and make them eminently common carriers. Their iron roads, though built in the first instance by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can only be justified on that ground. * * * Being liable as common carriers the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods during the transit, except those arising from the act of God or the public enemy."

(4) Hutchinson Carriers, 3d ed., Vol. I, chap. III, sec. 76, p. 74. See also cases cited in note 71.

(5) Hutchinson Carriers, 3d ed., Vol. I, chap. III, sec. 76, p. 75; Little Rock, etc., R. R. Co. vs. Glidewell, 39 Ark. 487.

carrier to the same extent that the railroad corporation would be.[6]

It is only when a railroad company, by special agreement, undertakes to carry something which is not its business to carry or departs from its usual method of doing business, that it is not liable as a common carrier.[7]

Railroads incorporated under state authority and thereby receiving a delegation of a part of the state's sovereign power for the public good, are in that sense agents of the state, and provide a public utility of transportation in the place and stead of the government. Such railroads exercise public duties, being authorized by law to carry goods and passengers for hire and are brought within all the rules of the common law as that law imposes liabilities and duties upon common carriers of goods and passengers. The state court decisions are determinative of the legal status as common carriers of railroads operating within such states.[8]

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(6) Hutchinson Carriers, 3d ed., Vol. I, chap. III, sec. 76, p. 75; Davis vs. Button, 78 Cal. 247.

(7) Hutchinson Carriers, 3d ed., Vol. I, chap. III, sec. 76, p. 75; Dixon vs. Railroad Co., 110 Ga. 173, 35 S. E. Rep. 369; Schmidt vs. Railway Co., 90 Wis. 504, 63 N. W. Rep. 1057; North German Lloyd S. S. Co. vs. Bullen, 111 Ill. App. 426.

(8) Kirby vs. Adams Exp. Co., 2 Mo. App. 369; Bank of Kentucky vs. Adams Exp. Co., 93 U. S. 174; Read vs. Spaulding, 5 Bosw. (N. Y.) 395; Buckland vs. Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68; Weed vs. Saratoga R. R. Co., 19 Wend. (N. Y.) 534; Root vs. Great Western R. Co., 45 N. Y. 524; Camden, etc., R. Co. vs. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; Winona, etc., R. Co. vs. Blake, 94 U. S. 180, 24 L. Ed. 99; Atlantic & P. R. Co. vs. Laird, 15 U. S. App. 248, 58 Fed. Rep. 760, 7 C. C. A. 489, railroads are quasi-public highways, and all railroad corporations actively engaged in operating passenger trains are subject to the liabilities and duties imposed by law upon common carriers of passengers.

Alabama: Southwestern R. Co. vs. Webb, 48 Ala. 585; Mobile, etc., R. Co. vs. Prewitt, 46 Ala. 63, 7 Am. Rep. 586; Selma, etc., R. Co. vs. Butts, 43 Ala. 385, 94 Am. Dec. 694.

Arkansas: Eureka Springs R. Co. vs. Timmons, 51 Ark. 459.

California: Davis vs. Button, 78 Cal. 247; Contra Costa, etc., R. Co. vs. Moss, 23 Cal. 323, 533.

Colorado: Schloss vs. Wood, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492.

Connecticut Fuller vs. Naugatuck R. Co., 21 Conn. 570.

Florida: Johnson vs. Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731.

Georgia: Falvey vs. Georgia R. Co., 76 Ga. 597, 2 Am. St. Rep. 58.

Illinois: Peoria, etc., R. Co. vs. U. S. Rolling Stock Co., 28 Ill. App. 79; Chicago, etc., R. Co. vs. Thompson, 19 Ill. 578.

Massachusetts: Thomas vs. Boston, etc., R. Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Norway Plains Co. vs. Boston, etc., R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 424.

Mississippi: Southern Exp. Co. vs. Thornton, 41 Miss. 216; Southern Exp. Co. vs. Moon, 39 Miss. 822; Mississippi Cent. R. Co. vs. Kennedy, 41 Miss. 671; Const. of Mississippi, sec. 184.

New Hampshire: Elkins vs. Boston, etc., R. Co., 3 Fost. (N. H.) 275.

New Jersey: Rogers Locomotive, etc., Works vs. Erie R. Co., 5 C. E. Greene (N. J.) 379, 20 N. J. Eq. 379; Messenger vs. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457.

Ohio: Scofield vs. Lake Shore, etc., R. Co., 43 Ohio St. 571, 23 Am. & Eng. R. Cas. 612.

Oregon: Thomson-Houston Electric Co. vs. Simon, 20 Or. 60, 23 Am. St. Rep. 86, 47 Am. & Eng. R. Cas. 51.

Pennsylvania: Eagle vs. White, 6 Whart. (Pa.) 505; Sansford vs. Catawissa, etc., R. Co., 24 Pa. St. 378, 64 Am. Dec. 667.

South Carolina: Piedmont Mfg. Co. vs. Columbia, etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. Cas. 194; Avinger vs. South Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 524; Dill vs. South Carolina R., 7 Rich. Law (S. C.) 158, 62 Am. Rep. 407; Ex parte Benson, 18 S. C. 42.

Tennessee: East Tennessee, etc., R. Co. vs. Nelson, 1 Cold. (Tenn.) 272.

Vermont: Mimball vs. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567; Jones vs. Western Vermont R. Co., 27 Vt. 399; Noyes vs. Railroad, 27 Vt. 110.

Pegler vs. Monmouthshire R. Co., 30 L. J. Exch. 249, 6 H. & N. 644; Palmer vs. Grand Junction R. Co., 4 M. & W. 749, 1 H. & H. 489, 7 D. P. C. 232; Crouch vs. London, etc., R. Co., 23 L. J. C. P. 73, 14 C. B. 255, 78 E. C. L. 255; Richards vs. London, etc., R. Co., 18 L. J. C. P. 251, 7 C. B. 839, 62 E. C. L. 839; Elkins vs. Boston, etc., R. Co., 23 N. H. 275; Avinger vs. South Carolina R. Co., 29 S. C. 265, 35 Am. & Eng. R. Cas. 519; Piedmont Mfg. Co. vs. Columbia, etc., R. Co., 18 S. C. 353, 16 Am. & Eng. R. Cas. 194; Ryland vs. Peters, 5 Pa. Law G. Rep. 126; Union Pac. R. Co. vs. Rainey (Colo.), 34 Pac. 986; Central of Georgia Ry. Co. vs. Hall, 124 Ga. 322, 52 S. E. 679; Baker vs. Boston & M. R. Co., 74 N. H. 100, 65 Atl. 386; W. C. Agee & Co. vs. Louisville & N. R. Co., — Ala. —, 37 So. 680; Davis vs. Button, 78 Cal. 247, 20 Pac. 545; Eureka Springs R. Co. vs. Timmons, 51 Ark. 459, 11 S. W. 690. See "One Railroad Transporting the Cars of Another," sec. 14, ante; Little Rock, etc., R. Co. vs. Gildewell, 39 Ark. 487, 18 Am. & Eng. R. Cas. 539; Maslin vs. Baltimore & O. R. Co., 14 W. Va. 180; Root vs. Great Western R. Co., 45 N. Y. 524; Chicago, etc., R. Co. vs. Thompson, 19 Ill. 578; Thomson-Houston Elec. Co. vs.

§ 2. Transportation Companies.

A transportation company which neither owns nor controls any means of conveyance, but engages on its own behalf in the business of transporting goods through the agency and over the lines of other carriers, is a common carrier, subject to all of the duties and responsibilities attaching to a carrier of that character.[9]

Simon, 20 Or. 60, 47 Am. & Eng. R. Cas. 51; Nashville, etc., R. Co. vs. Messino, 1 Sneed (Tenn.) 220; Shoemaker vs. Kingsbury, 12 Wall. (U. S.) 369; Murch vs. Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631, a railroad company is a carrier of passengers only as to its passenger trains. It does not although it may occasionally carry passengers on them as a matter of accommodation, and although in such cases it charges the usual fare. See also: Carriers of Passengers, chap. XXII; Burnell vs. New York Cent. R. Co., 45 N. Y. 184; Merrill vs. Grinnell, 30 N. Y. 594; Camden, etc., R. Co. vs. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; Hollister vs. Nowlen, 19 Wend. (N. Y.) 234; Cole vs. Goodwin, 19 Wend. (N. Y.) 251; Powell vs. Myers, 26 Wend. (N. Y.) 591. See also: Carriers of Passengers, chap. XXII; Butler vs. Hudson River R. Co., 3 E. D. Smith (N. Y.) 571; Langworthy vs. New York, etc., R. Co., 2 E. D. Smith (N. Y.) 195; Elkins vs. Boston, etc., R. Co., 23 N. H. 275; Humphreys vs. Perry, 148 U. S. 627, 54 Am. & Eng. R. Cas. 29, 7 Am. R. & Corp. Rep. 686, 13 Sup. Ct. 711, 37 L. Ed. 587, 47 Alb. L. J. 386, wherein it was held that a passenger could not recover for the loss of a stock of jewelry contained in a trunk presented to the baggage agent as his personal baggage, unless the loss occurred through gross negligence. Schloss vs. Wood, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492; Avinger vs. South Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 526; Scofield vs. Lake Shore, etc., R. Co., 43 Ohio St. 571, 54 Am. Rep. 846, 23 Am. & Eng. R. Cas. 612; Norway Plains Co. vs. Boston, etc., R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423; Caldwell vs. Richmond, etc., R. Co., 89 Ga. 550; Denver, etc., R. Co. vs. Cahill, 8 Colo. App. 158; Laurel Fork, etc., R. Co. vs. West Virginia Transp. Co., 25 W. Va. 324; West Virginia Transp. Co. vs. Sweetzer, 25 W. Va. 434; Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 10, cases cited in footnotes 53 to 70a, both incl.; Piedmont Manufacturing Co. vs. Columbia, etc., R. R. Co., 19 S. C. 353, 16 Am. & Eng. R. R. Cas. 194, holding that a South Carolina railroad company, which is liable as a common carrier within the termini of its own line, is not liable as such beyond its own line. "In other words, it is not liable as a common carrier over connecting lines, unless it has assumed such liability by a special contract, or becomes so by usage or the character of its business."

[9] Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 15, pp. 52 and 53; Merchants Despatch Transportation Co. vs. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; Merchants Despatch

§ 3. Railroads Performing Special Transportation Services.

The owner of goods, by contract with a railroad, may hire from it cars for the loading and transportation of goods, the railroad on its part, agreeing to furnish the motive power and the use of its road only in the transportation. In such a case, the railroad company in thus transporting the goods does not do so in the capacity of a common carrier and is not held liable for any loss or damage to the goods, under such circumstances, not occasioned by its negligence. This was the rule established in **East Tennessee, etc., R. R. Co.** vs. **Whittle,** 27 Ga. 535; **Railroad** vs. **Dunbar,** 20 Ill. 623, and **Kimball** vs. **the Railroad,** 26 Vt. 247, but in **Mallory** vs. **the Railroad,** 39 Barb. 488, and **Hannibal, etc., R. R. Co.** vs. **Swift,** 12 Wall. 262, it was held that the railroad company was still liable as a common carrier for the safety of the goods.[10]

Where a railroad company transports a special train of cars loaded with wild animals and other property, including persons, belonging to or connected with a circus, menagerie, or theatrical show, the conditions of the contract being that such animals and property are unloaded and loaded by the proprietor of the circus, the train to be run on special time to suit such proprietor's convenience, and it being agreed that he shall assume all the risk of accidents, such railroad company is not a common or public carrier and its only duty is to haul the cars.

Transportation Co. vs. Comforth, 3 Colo. 280, 25 Am. Rep. 757; Mercantile Mutual Marine Insurance Co. vs. Chase, 1 E. D. Smith (N. Y.) 115; Robinson vs. Merchants Despatch Transportation Co., 45 Iowa 470; Stewart vs. Merchants Despatch Transp. Co., 47 Iowa 229, 29 Am. Rep. 476; Wilde vs. Merchants Despatch Transp. Co., 47 Iowa 347, 29 Am. Rep. 479; Bancroft vs. Merchants Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482; Merchants Despatch Transp. Co. vs. Bolles, 80 Ill. 473.

[10] Hutchinson Carriers, 3d ed., Vol. I, chap. III, sec. 87, p. 84.

In Coup vs. Wabash, etc., R. R. Co., 56 Mich. 111, 56 Am. Rep. 374, 18 Am. & Eng. R. R. Cas. 542, it was held that the railroad did not sustain the relation of common carrier, and was therefore entitled to stipulate against any liability whatever. The railroad was not chargeable as a common carrier, since it did not hold itself out as a carrier of wild animals, etc., not as carrying on special schedules or trains, and could only be charged upon the special contract, and that being valid, the stipulation against liability would preclude a recovery. At most the railroad was liable only for negligence. It did not profess, and was under no obligation, to undertake such transportation.[11]

The rule has been laid down that a railroad company is not required as a common carrier to take a circus train, a part of which is loaded with wild animals, and transport the same over its line. It may refuse to transport such train except under the contract of a private carrier specially limiting its liability. While a railroad as a common carrier may not legally be required to accept and transport show cars owned by showmen and used to house and transport show employees and show property, if it agrees to transport such cars for hire by furnishing motive power to move them and brakemen to accompany them under the control of the railroad's agent or conductor, the railroad then becomes liable as a common carrier for injury to either the care or the property of the showmen, unless such injury is caused by inevitable accident or the public enemies.[12]

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(11) Chicago, etc., R. R. Co. vs. Wallace, 66 Fed. 506, 24 U. S. App. 589; Robertson vs. Old Colony R. R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; Watson vs. North British R. R. Co., 3 Ry. & C. D. Cas. 17.

(12) Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 39, pp. 96 and 97, and cases cited in footnotes 4 to 6b, both incl.; Hutch-

§ 4. Fast Freight Lines and Despatch Companies.

In conformity with the principle that a common carrier undertaking the service of transportation need not necessarily own the means thereof, fast freight lines and despatch companies, which conduct their business by the employment of the means of transportation furnished to them by others, are common carriers, and subject to the rigid rules of responsibility as other common carriers. "Public opinion demands that the right of the owners to absolute security against the negligence of the carrier and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company." [13]

§ 5. Receivers, Assignees and Trustees of Railroad Companies.

When the control of a railroad is officially vested in a receiver or assignee in bankruptcy or trustee for bondholders, such receiver, assignee or trustee, in operating and controlling the railroad, is liable as a common carrier.

"But where a receiver," says Moore on Common Carriers, "is in possession of and operating a leased road not as an officer of any court or by its authority, but by virtue of a contract simply permitted by the court, he is not protected by being a receiver, but is liable like an individual for injuries resulting from his negligence, or the

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inson Carriers, 3d ed., Vol. I, secs. 87 and 88, pp. 84 to 86; Robinson vs. The Railroad, 156 Mass. 525, 31 N. E. Rep. 650, 32 Am. St. Rep. 482; Forepaugh vs. The Railroad, 128 Penn. St. 217, 18 Atl. Rep. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508; Wilson vs. The Railroad, 129 Fed. 774, affirmed in 133 Fed. 1022, 66 C. C. A. 486.

[13] Bank of Kentucky vs. Adams Express Co., 93 U. S. 174; J. H. Cowe Glove Co. vs. Merchants Despatch Transportation Co., 106 N. W. Rep. 749. See also: Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 16, p. 53, and citation of cases in footnote 95.

negligence of his employes in the operation of the road. And, while a court of equity will protect persons acting under its process or authority, in the execution of a decree or decretal order, against suits at law, and will compel parties to apply to that court for relief, this protection is accorded by that court to its officers only on their own application, and is granted in the exercise of the court's discretion, and it is presumed that it would be granted in any necessary or proper case; waiving this right to invoke the aid of the court, they are amenable in the common law courts to action for negligence as common carriers. * * * Upon principle and authority, it has been held, a receiver, operating a railroad under the order of a court of equity, stands in respect to duty and liability, just where the corporation would, were it operating the road, and the question whether or not the receiver is liable for negligence must be tested by the same rules that would be applied if the corporation was the actual party defendant before the court." [14]

§ 6. Terminal Railroads and Switching Companies.

In **United States** vs. **Sioux City Stock Yards Co.**, 162 Fed. 556, affirmed in 167 Fed. 126, it was held that a terminal railroad company owning no cars of its own and transporting only the railroad cars of other companies, is a common carrier of perishable property. So, in **United States** vs. **St. Joseph Stock Yards Co.**, 181 Fed. 625 (D. C.

[14] Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 11, pp. 46 and 47; Blumenthal vs. Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Newell vs. Smith, 49 Vt. 260; Paige vs. Smith, 99 Mass. 395; Nickols vs. Smith, 115 Mass. 332; Ballou vs. Farnam, 9 Allen (Mass.) 47; Barter vs. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Lamphear vs. Buckingham, 33 Conn. 237; Klein vs. Jewett, 26 N. J. Eq. 474; United States vs. Ramsey, 197 Fed. 444; Hutchinson Carriers, 3d ed., Vol. I, chap. III, sec. 77, p. 75; Faulkner vs. Hart, 44 N. Y. Sup. Ct. 471; Sprague vs. Smith, 29 Vt. 421; Rogers vs. Wheeler, 2 Lans. 486, 43 N. Y. 598.

Mo. 1909), a stock yards company owning stock yards, switch tracks encircling the stock yards, and connecting therewith, and connecting with the trunk line railroads, and doing what is known as a terminal business, to the extent that all cars of live stock in and out from the stock yards pass over its lines or switches, over which it alone moves the cars with its own locomotives and crews, but issues no bills of lading and receives no part of the freight charges paid to the trunk line companies, but receives $1.00 for each car moved from the connection of the trunk lines to the stock yards or the packing houses, was a railroad company and a common carrier for hire.

In **Missouri Pacific Railroad Co.** vs. **Chicago, etc., R. R. Co.,** 25 Fed. 317, 23 Am. & Eng. R. R. Cases 718, the court declared that a railroad company which contracts to furnish the motive power for the movement of passenger and freight cars of another railroad, together with their contents, over its road, has cast upon it the liabilities of a common carrier in respect thereto, and is liable as a common carrier for loss or injury to the cars and their contents, and this, even though destroyed by fire or caused by a defect in the tracks of the transporting company, arising from a cause beyond its control. This does not defeat the rule, however, held in other cases that if the goods are destroyed by fire after delivery to the consignee, or after they have been tendered to him, the company is not liable, if not at fault. In the latter case the duties are only those of warehousemen.

In **Peoria, etc., R. R. Co.** vs. **Chicago, etc., R. R. Co.,** 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. R. Cas. 506, where a railroad company is bound by statute to haul the cars of another company, and having received a car to be hauled to a certain point, if, without authority, it hauls it to another point, where it is destroyed by fire,

the court held that the hauling company incurs the liability of a common carrier.

A distinguishable rule was laid down in **East Tennessee, etc., Co.** vs. **Whittle,** 27 Ga. 535, 73 Am. Dec. 741; **Ohio, etc., R. R. Co.** vs. **Dunbar,** 20 Ill. 623, to the effect that when the railroad company merely furnishes the motive power and the roadbed, and contracts to haul the cars of the shipper, it is not liable to the common carrier of the goods contained within such cars, but is liable only for losses resulting from its negligence. But this rule, however, should only prevail when it appears that all control over the goods within the cars is taken from the carrier and delegated to agents of the shipper. Said the court:

> "The point was incidentally made * * * that this was not a case of carrying at all, but was analogous to that of towing a boat upon a water navigation, where the party supplying the motive power does not receive the boat into his custody or exercise any control over it other than such as results from the act of towing; in which case it has been held that the common law liability of a carrier does not attach. **Caton** vs. **Rumney,** 13 Wend. (N. Y.) 387. This doctrine has been denied in **Smith** vs. **Pierce,** 1 La. 349. But however the rule may be in cases of towing boats under these circumstances, the analogy does not hold good in the present case. Here the defendants received the car to take over their road and had exclusive charge of it, though they took it on its own tracks." [15]

A company whose principal business is switching cars for other railroad companies, its tracks connecting with those of the other railroad by a transfer switch, and with mills, elevators and manufactories near where its busi-

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[15] Mallory vs. Tioga R. R. Co., 39 Barb. (N. Y.) 488; New Jersey, etc., R. R. Co. vs. Pa. R. R. Co., 27 N. J. L. 100.

ness is transacted, is a common carrier, under the rule that a railroad company, in the general business of switching cars for all railroads which will furnish it business, is a common carrier.[16]

This is contradistinguished from the rule in **Texas & Pacific Ry. Co.** vs. **Henson,** 56 Tex. Civ. App. 468, 121 S. W. 1027, where it was held that a belt line railway company, owning a locomotive and flat car and fifteen miles of track, which makes connection with various railroad companies, and switches cars for these companies to stock yards and other railroad connections, but has no depot or loading facilities, furnishes no cars, makes no charges to shippers or contracts with them, receiving compensation for its services from the railroad companies, is not a common carrier.

In **W. C. Agee & Co.** vs. **Louisville & N. R. Co.,** 142 Ala. 344, 37 Sou. 680, the court held that a railroad, which serves business houses located along a spur track by delivering to them cars of freight and cars to be freighted and shipped, is a common carrier with respect to the use it makes of the track, and is, as such, bound to treat the houses located along the track without discrimination, and therefore it can not discontinue its service as to one and continue it as to others. The common ownership of an industry and a short line serving it is not in itself sufficient to divest the railroad of its status as a common carrier. On the other hand, the fact that the rails, locomotives, and cars of an industry had been turned over to an incorporated railroad company owned and operated by the industry or in its interest, does not divest those appliances of their character as a plant facility, if such, in fact,

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[16] Peoria, etc., R. R. Co. vs. United States Rolling-Stock Co., 28 Ill. App. 79; Kansas City Southern Ry. Co. vs. Rosebrook-Josey Grain Co., 114 S. W. 436.

is the case. A line must be drawn at some point between what is transportation and what is industry and between a facility of transportation and a plant facility or tool of the industry. Each case, however, must stand on its own facts.

An industrial railroad, as that phrase is now commonly used, is a short line constructed primarily to serve the particular plant or industry in the general interests of which it is owned and operated. It consists of the tracks connecting the various factories, warehouses, and other buildings of the industry with one another, and ordinarily has a connection with one or more adjacent trunk lines by means of a track leading from the plant to their rights of way. It serves the industry by receiving its inbound shipments of raw materials from the trunk lines and agreed interchange points, distributing them among the various buildings according to the requirements of the manufacturing operations, and by taking its finished products from the plant to the trunk lines and agreed interchange points, distributing them among the various buildings according to the requirements of the manufacturing operations; is also often in a position to effect all the necessary movements of materials and partially finished products from building to building in the plant. The rails, tracks, and locomotives are more frequently operated as a bureau of the industry and no pretense is made of serving outside interests. In recent years, however, a practice has sprung up under which the rails, tracks, and locomotives operated and used in and around an industrial plant, when set over to a small incorporated railroad company organized for the purpose and owned by the industry or in its interest, are thereafter dealt with by the regular lines as something wholly apart from the industry and as if they constituted a common carrier in the service of the general public, par-

ticipating on an equal basis with other carriers in the transportation of the traffic of the country. On this theory of their status, many industrial lines receive allowances of the rates both from the traffic of the controlling industry and upon such traffic of outside interests as they may handle.

In the Central Yellow Pine Association[17] case the Interstate Commerce Commission, speaking of the status of tap lines, said:

> "While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they run as private enterprises, do more or less side transportation, and it would be difficult to draw any line of demarcation between the logging road as such and the logging which has become a general carrier of freight." [18]

The Supreme Court of the United States declared that these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the state. They are so treated by the public authorities of the state who insist that they are such. They are engaged in carrying for hire the goods of those who see

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(17) Central Yellow Pine Assn. vs. Vicksburg-Shreveport & Pacific R. R. Co., 10 I. C. C. 193, 199.
(18) Id.

fit to employ them. They are authorized to exercise the right of eminent domain by the state of their incorporation. That they were dealt and treated with as common carriers by connecting systems of other carriers, is a circumstance to be noted in determining their true character.[19]

Applying the principle above stated as determinative of the character of these roads, the Supreme Court declared them to fill all the requirements of common carriers so employed, unless the grounds upon which they were determined not to be such by the Commission, are adequate to that end. The Interstate Commerce Commission itself as to all tap lines other than those controlled by the so-called proprietary companies, treated them as common carriers, for it ordered the trunk lines to re-establish through routes and joint rates to such traffic.[20]

§ 7. Carriers of Passengers.

Generally speaking, carriers of passengers, as such, are not common carriers except as to the baggage of their passengers.

(1) **Sleeping and Parlor-Car Companies.** Aside from the statutory status as common carrier given to sleeping and parlor-car companies for administrative purposes in

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[19] Tap Line Cases, 234 U. S. 1, 26; United States vs. Union Stock Yard & Transit Co., 226 U. S. 286. See also: Coe vs. Errol, 116 U. S. 517; Covington Stock Yards Co. vs. Keiph, 139 U. S. 128; Southern Pacific Term. Co. vs. Interstate Com. Comm., 219 U. S. 498, holding that they are engaged in transportation as that term is defined in the Commerce Act and described in the decisions of the Supreme Court of the United States.

[20] Moore on Common Carriers, 2d ed., Vol. I, chap. II, secs. 14 and 44, pp. 50 to 52 and 104 to 105, and cases cited in footnotes Nos. 85 to 90 and 21 to 240, both incl.

the Act to Regulate Commerce, such companies are not common carriers of passengers, nor of their goods, nor are they liable as innkeepers. Neither are sleeping-car companies insurers of the baggage, money or other personal effects of a passenger, the courts having universally refused to attach the extraordinary liability of innkeepers and common carriers of goods to sleeping and parlor-car companies. The ground of liability of these companies rests entirely in negligence. A sleeping or parlor-car company is bound to exercise reasonable care and diligence in looking after the person and property of a passenger and they are bound to so manage their cars as not unreasonably to expose the property or person of the passenger to unusual risk of loss by thieves or accident. While there are numerous cases holding the sleeping-car company liable for the loss or theft of the property, including jewelry and money, of passengers, through the negligence of the car employees, the sleeping-car company is not liable for the loss of baggage where the passenger himself is negligent.

In **Edmunson** vs. **Pullman Palace Car Co.**, 92 Fed. 824, 14 Am. & Eng. R. R. Cas. N. S. 336, the court held that a sleeping-car company was not liable for sickness contracted by an occupant of an upper berth from water dripping from an open ventilating window during a heavy rain storm in the night, where the passenger did not notify those in charge of the train that he needed special care, or request those in charge of the car to close the ventilator and was in a position to reach and close it himself at any time. It has, however, been held by the court that a sleeping-car company is liable in damages for its failure to reserve a berth for a passenger or for failure to furnish him with a berth in accordance with a ticket purchased

and paid for by him, the damages arising out of breach of contract.[21]

> "A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of its cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such step to protect himself in a sleeping-car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.
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> "The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passenger from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passenger and the company, and the decided weight of authority supports it." [22]

(2) **Railroad Company Transporting Dog Belonging to Passenger.** At common law the old rule obtained that there was no property in a dog, it being held to be ferae naturae. Both by statute and judicial construction the rule has been changed and the courts now permit recovery

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(21) Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 24, pp. 63 to 69, and citation of cases in footnotes Nos. 26 to 45c, both incl.

(22) Hutchinson Carriers, 3d ed., Vol. II, chap. XI, Part II, sec. 1130, pp. 1331 and 1332, and citation of cases in footnote 25.

to be had by the owner for the loss of, or injury to, a dog delivered to a carrier for transportation, the extent of the liability of the carrier being the same as is applied to other classes of animals.

In **Gregory** vs. **Chicago, etc., R. R. Co.,** 100 Iowa 345, 69 N. W. 532, the court held that a conductor is justified in removing a passenger from a passenger car, who, in defiance of the company's rule against the carrying of dogs in passenger coaches, refuses to remove a dog which he has with him, on request to do so by the conductor.

In **Cantling** vs. **Hannibal, etc., R. R. Co.,** 54 Mo. 385, wherein it was shown that the company's rules and regulations were printed and posted in the various stations, but no special notice of this rule was brought home to the owner of the dog, it was held that where a railroad passenger, without special notice of the company's regulation that "live animals are allowed as baggagemen's perquisites," delivered a dog to the baggage-master and paid him for its transportation, the company was liable for the loss of the dog occasioned by the baggageman delivering it to the wrong person.

This rule has been adhered to by other courts.[23]

(4) **Hackmen, Wagoners, Etc.** The proprietors of such land vehicles as automobiles, taxicabs, cabs, hacks, stage-coaches, omnibuses, drays, carts, wagons, and sleds, who publicly proclaim the business of carrying for hire the persons and goods of those who choose to employ them, are common carriers of the goods and property carried by them, but not as to their passengers.

It is obvious that such a state of facts may exist that the proprietors of such land vehicles are not common carriers, but merely ordinary bailees for hire. Thus, the

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(23) Kansas City, etc., R. R. Co. vs. Higdon, 94 Ala. 286, 33 Am. St. Rep 119, 52 Am. & Eng. R. R. Cas. 495.

hackman transports passengers about the streets of a city, with no fixed route or departure and arrival times. He may lease his vehicle or otherwise operate it to suit his own or the wishes of his customer. If he finds it profitable so to do, he may pursue his business regularly; if not, he may withdraw from the business and remain idle. In this manner he cannot be said to be under the duties and obligations of a common carrier.[24]

The proprietors of these land vehicles, as carriers of passengers, are liable for their baggage, even though no distinct compensation is received therefor.[25]

Stagecoach proprietors, whose status is that of common carriers of the baggage of their passengers, cannot restrict their liability by a general notice that "the baggage of passengers is carried at the risk of the owner." [26]

In **Gordon** vs. **Hutchinson,** 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; **Moses** vs. **Norris,** 4 N. H. 304; **Moses** vs. **Boston, etc., R. R. Co.,** 24 N. H. 71, 55 Am. Dec. 222; **Powers** vs. **Davenport,** 7 Blatchf. (Ind.) 497, 43 Am. Dec. 100; **Chevallier** vs. **Strahm,** 2 Tex. 115, 47 Am. Dec. 639, it was uniformly held that a wagoner who, upon his own request, carries goods for hire, is a common carrier. In **Chevallier** vs. **Strahm, supra,** the court said that there were no

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(24) Brown vs. New York Central & Hudson River R. R. Co., 75 Hun (N. Y.) 355, 56 St. Rep. (N. Y.) 748, 27 N. Y. Supp. 69. See also: Steiner vs. Metropolitan Street Ry. Co., 84 N. Y. Supp. 285; Fisher vs. Tryon, 15 Ohio Cir. Ct. Rep. 541, 8 O. C. D. 556; Atlantic City vs. Brown, 71 N. J. Law 81, 58 Atl. 110. See also: Terminal Taxicab Co. vs Comrs. of D. C., — U. S. —.

(25) Orange Co. Bank vs. Brown, 9 Wend. (N. Y.) 85; Hawkins vs. Hoffman, 6 Hill (N. Y.) 586; Hollister vs. Nollen, 19 Wend. (N. Y.) 234; Cole vs. Goodwin, 19 Wend. (N. Y.) 251; McGill vs. Rowand, 3 Bar. (Pa.) 451; Bomer vs. Maxwell, 9 Humph. (Tenn.) 621; Brooke vs. Pickwick, 4 Bing. (Eng.) 218.

(26) Hollister vs. Nollen, 19 Wend. (N. Y.) 234; Cole vs. Goodwin, 19 Wend. (N. Y.) 251; Clark vs. Faxton, 21 Wend. (N. Y.) 153; Powell vs. Meyers, 26 Wend. (N. Y.) 591; Camden & Amboy R. R. Co. vs. Belknap, 21 Wend. (N. Y.) 354; Jones vs. Voorhees, 10 Ohio 145.

grounds in reason why the occasional carrier, who periodically, in every year, abandoned his other pursuits and assumes that of transporting goods for the public, should be exempted from any of the risks incurred by those who make the carrying business a constant or principal occupation. Referring to this rule, Moore on Common Carriers says:

> "But the weight of authority seems to favor the contrary position, that an occasional undertaking to carry goods will not make a person a common carrier, but that the business must be habitual, not casual."

The case of Fish vs. Chapman, 2 Ga. 353, 46 Am. Dec. 393, approved in Nugent vs. Smith, 1 C. P. Div. 27, is referred to as the leading authority sustaining this view. It was the case where a farmer had never held himself out as a carrier generally, but was employed by the plaintiff to carry goods which, in crossing a stream upon the way, were injured by the upsetting of the wagon. The court, referring to the case of **Gordon** vs. **Hutchinson,** 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, said:

> "This decision no doubt contemplates an undertaking to carry generally without a special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be little doubt but that case is opposed to the principles of the common law, and its rule wholly inexpedient."

This rule was again followed in **Harrison** vs. **Roy,** 39 Miss. 396, but is important merely as case law, where it was held that the wagoner had made himself liable as a common carrier, the court saying that, if the transaction

had been a mere isolated undertaking, such as he had not been engaging in, and which was foreign to his regular and usual business, there would have been force in the position that he could not be so held. **Steinman** vs. **Wilkins,** 7 W. & S. (Pa.) 466, 42 Am. Dec. 254, was referred to as holding that a wagoner was not a common carrier to the extent of rendering him liable for a refusal to carry.

It is doubtful if any hard and fast rule could be laid down governing the common carrier status of these land vehicles. The facts attending the particular employment of such vehicle carriers must be determinative of their common carrier status. Thus it has been held that where one was engaged in the business of trucking goods from a railroad depot to different stores within a city, but for particular customers, and at a price in each case fixed by special contract, he was not a common carrier.[27]

In **Brind** vs. **Dale,** 8 Car. & P. 207, it appeared that the defendant was the owner of a number of carts which were kept ready to be hired by any person who chose to employ them, either by the hour, or job, defendant being what was called a town carman. One of these carts was employed by the plaintiff to carry certain packages a short distance. The cart was driven by the defendant, plaintiff agreeing to go along with him and keep watch upon the goods. At the end of the trip, it was found that one of the packages was missing. Lord Abinger instructed the jury that, in his opinion, the defendant, who was sued for the loss of the package, was not, in performing the service of carriage under the circumstances, a common carrier. Referring to this case, Judge Story, in his work on Bailments, sec. 496, n., says:

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[27] Faucher vs. Wilson, 68 N. H. 338, 38 Atl. Rep. 1002, 39 L. R. A. 431.

> "What substantial distinction is there in the case of parties who ply for hire in the carriage of goods for all persons indifferently, whether the goods are carried from one town to another, or from one place to another in the same town? Is there any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatsoever, to all from any places in the same town or in different towns?"

In Moses vs. The Railroad, 24 N. H. 71, the question was treated as doubtful upon principle.

The rule is best stated in Hutchinson that "the proprietors of land vehicles of every kind, such as stage and hackney coaches, omnibuses, cabs, drays, carts, wagons, sleds, and street cars, who make it a business to carry for hire the goods of such as choose to employ them, even though it may be within the limits of the same town or city, are reckoned as common carriers, and held liable as such." [28]

Common porters and transfer companies engaged in the business of transferring baggage or freight to and from railroad or steamship depots, or between different parts of towns and cities, are common carriers. As such they are responsible for the safe keeping and delivery of such baggage and freight.[29]

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[28] Hutchinson Carriers, 3d ed., Vol. I, chap. III, secs. 68 to 70, pp. 63 to 68; Bonce vs. Dubuque, etc., Co., 53 Iowa 278; Budd vs. Carriage Co., 25 Or. 314, 35 Pac. Rep. 620, 27 L. R. A. 279; Parmelee vs. Lowitz, 74 Ill. 116; Dipple vs. Brown, 12 Ga. 217; Parmelee vs. McNulty, 19 Ill. 556; Levi vs. R. R. Co., 11 Allen 300.

[29] DaPonte vs. New Orleans Transfer Co., 42 La. Ann. 696, 7 So. 608; Richards vs. Westcott, 2 Bosw. (N. Y.) 589; Verner vs. Sweitzer, 32 Pa. St. 208; Jackson Architectural Iron Works vs. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432; Benson vs. Oregon Short Line R. R. Co., 99 Pac. 1072 (Utah 1909).

In Nanson vs. Jacob, 12 Mo. App., a transfer company transferring freight from one connecting line to another, or from the depot of the last of several connecting carriers to the consignee, was held not to be a connecting carrier but merely an agent of one of the connecting lines or of the consignee.

A storage and public moving van company, engaged in moving household goods from one house in a city to another, is only a bailee for hire and liable for the negligence of its service. It is not a common carrier having a lien on the property moved by it, entitling it to retain the property until its charges are paid. On the other hand, a transfer and storage company, employed in the business of warehousing goods and forwarding them for a compensation in carload lots, is a common carrier and liable as such for the destruction of the goods while in its warehouse. Noting the exception, the rule may be properly stated that public moving van companies, draymen, and truckmen, engaged in transporting goods and merchandise, are common carriers and subject to reasonable regulation as such.[30]

In summary, therefore, it may be said that the liability as a common carrier may be implied from the custom of the carrier, but may be qualified by express contract or general notice, the onus of proving the qualification being on the party setting it up. Proof of general notice of limitation of liability must be such as amounts to actual notice. Emblazoning the general object on a check, ticket, or notice in large letters, but stating the restrictions in small ones, is insufficient. But the effect of such

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[30] Thompson vs. New York Storage Co., 97 Mo. App. 135, 70 S. W. 938; Jaminet vs. American Storage & Moving Co., 109 Mo. App. 257, 84 S. W. 128; Kettenhofen vs. Globe Transfer & Storage Co., 70 Wash. 645, 127 Pac. 295; Lawson vs. Connolly, 141 N. W. 623.

notice is no more than to render the bailees private carriers for hire.[31]

(4) **Proprietors of Passenger Elevators.** The law is not uniformly settled as to the exact status and character of the owners and operators of elevators used in public office buildings for the purpose of lifting and lowering the occupants of the building as well as the public having business in such buildings. In Massachusetts the courts have held that the owner of a passenger elevator for the use of tenants and others in the building, being under no obligation to carry passengers, is not a common carrier of passengers. The language of the court was:

> "The modern liability of common carriers of goods is a resultant of the two long accepted doctrines that bailees were answerable to the loss of goods in their charge, although happening without their fault, unless it was due to the public enemy, and that those exercising a common calling were bound to exercise it on demand and to show skill in their calling. Both doctrines have disappeared, although they have left this hybrid dependent. The law of common carriers of passengers, so far as peculiar to them, is a brother of the half-blood. It also goes back to the old principles concerning common callings. Carriers not exercising a common calling as such are not common carriers, whatever their liabilities may be. But the defendant did not exercise the common calling of its carrier, as sufficiently appears from the fact that he might have shut the elevator door in the plaintiff's face and arbitrarily have refused to carry him without incurring any liability to him. Apart from this consideration, manifestly it would be contrary to the ordinary usages of English to describe by such words the maintaining of an elevator as an inducement to

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(31) Verner vs. Sweitzer, 32 Pa. St. 208.

tenants to occupy rooms which the defendant wishes to let." [32]

In **Griffen** vs. **Manice,** 166 N. Y. 188, 59 N. E. 925, L. R. A. 922, 82 Am. St. Rep. 630, the New York court said:

> "Doubtless no distinction can be drawn between vertical transportation and horizontal transportation, or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was not a common carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied indication to enter, which the defendant as owner of the property is deemed to have extended to all who might have business on the premises."

The Rhode Island courts have held that a landlord who maintains an elevator in his private building for the use of tenants and their employees and customers is not a common carrier, nor is he bound with the same degree of care as that imposed upon a common carrier. He is required only to exercise reasonable care for the safety of those who enter upon his premises and use the elevator.[33]

Upon this subject, Moore on Common Carriers says:

> "In the Federal Courts and in the courts of some of the other states it has been held that persons operating elevators are carriers of passengers, the relation between them and their passengers being similar to

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(32) Seaver vs. Bradley, 179 Mass. 329, 69 N. E. 795, 88 Am. St. Rep. 384; Gibson vs. International Trust Co., 186 Mass. 454, 72 N. E. 70; Shattuck vs. Rand, 142 Mass. 83, 7 N. E. 43.

(33) Edwards vs. Manufacturers' Building Co., 27 R. I. 248, 61 Atl. 646; Blackwell vs. O'Gorman, 22 R. I. 638, 49 Atl. 28.

that between an ordinary common carrier and those carried by it, and that they are subject to the same rules as to the degree of care required and the onus of proof in case of injury from defects in or the giving away of machinery as are applicable to common carriers of passengers. The degree of care required is variously stated to be the utmost human care and foresight, the highest degree of care, extraordinary care, and the highest degree of care and diligence practically consistent with the efficient use and operation of such modes of transportation. In Missouri it has been held that a company operating an elevator in its office building for the use of tenants and their visitors is a common carrier of passengers for hire, and, though not an insurer of the safety of a passenger, must use such care, prudence, and caution to prevent injury to a passenger as a very careful and prudent person would use and exercise in a like business and under similar circumstances. And in Illinois the rule has been carried to the extent of holding that the owner of a building in which a freight elevator is operated, who permits an employe of his tenant to ride thereon in the discharge of his duties, occupies the relation of a common carrier of passengers for hire toward such employe, the hire received being the rent of the building, and is held to the highest degree of care to prevent injury to such employe. And in Indiana it is held that the owner of an office building, or an apartment house, who maintains and operates therein a passenger elevator for the use of his tenants and the public who choose to use the same, is, as to those who ride in the elevator, a 'common carrier of passengers' for hire. Some of the cases maintain that this strict liability is more expedient and conforms better with the present needs of society. For although an elevator operator is not technically a common carrier, yet the considerations of public policy which require extraordinary diligence of the latter, would seem to require a similar degree of diligence of the former. In each case the passenger's

safety depends wholly upon the operator's vigilance; in each case the probability of a serious accident unless extraordinary diligence is exercised, is imminent. The objection that an elevator operator receives no compensation for the carriage is met by the fact that he receives adequate compensation, indirectly at least, from the rent paid by the tenants. In Pennsylvania it has been held that, where a city operates an elevator in a public building, the rule applicable to common carriers, that the happening of an accident to a passenger raises **prima facie** a presumption of negligence on the part of the carrier, applies. In a recent New York case it was held that an unexplained drop of an elevator car of from twelve to fifteen inches, when a person enters it with a loaded truck, this being the ordinary use of the elevator, is such an unusual occurrence as requires the owner of the elevator, to explain its cause, or that it was without his fault." [34]

§ 8. Postmasters, Mail Contractors and Carriers of Mail.

Postmasters, mail contractors, and mail carriers, are instruments of government for the performance of acts in execution of functions assumed and controlled by the government, receive their compensation from the government, and, at most, are public agents discharging public duties, and therefore owe no duty as common carriers to those who receive the benefit of their services. Railroad companies, in pursuance of contracts with the government, are neither private or common carriers in the carrying of mail.[35]

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(34) Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 45, pp. 102 to 104, and cases cited in footnotes 15 to 20c, both incl.

(35) Hutchinson Carriers, 3d ed., Vol. I, chap. III, sec. 94, p. 90, and cases cited in footnotes 30 and 31; Story on Bailments, sec. 463; Moore on Common Carriers, 2d ed., Vol. I, chap. III, sec. 35, pp. 84 to 86, and cases cited in footnotes 81 to 88a, both incl.

§ 9. Express Companies.

Express companies are common carriers of the goods and merchandise which they, in their line of business, undertake to carry.

In **Stadhecker** vs. **Combs,** 9 Rich. (L. R.) 193, the court said:

> "There are considerations justifying a strict application of the law of common carriers to express companies. They profess to employ trusty agents, who are charged with the safe custody and speedy transit and delivery of all packages put in their charge. The effect of these inducements is in some measure to supersede the forwarding merchant, and to limit the liability of railroads and steamboat companies, who may be as faithful, and are certainly as responsible, agents. If they shall, by the promise of decided advantages over the usual modes of transportation, secure most of the business generally entrusted to common carriers, the public is concerned that they should be held to a rigid fulfillment of the promise. They cannot attain a greater speed than the railroad or steamboat which conveys them, and there is no proof that they are, in other respects, more trustworthy. The only advantage which in truth they can offer is the safer custody and more certain delivery of goods to the consignee without storage. These temptations may induce the public to employ them at an increased rate and they have no reason to complain of an exact application of the rule of law which enforces the responsibility which they voluntarily assume. We should be regardless of the great interests daily committed by the public to the express companies, with a confidence induced by their tempting offers, if their liability for the safe carriage and delivery is not rigorously enforced."

In **Hastings Express Co.** vs. **City of Chicago,** 135 Ill. App. 268, it was held that an express or teaming company

which owns horses and wagons and hires teamsters, by means of which merchandise is carried throughout a city for the public generally, is a common carrier within the meaning of an ordinance requiring the licensing of public carts, notwithstanding such express or teaming company exercises a discretion as to the persons whom it will serve. And in **Johnson Express Co.** vs. **City of Chicago,** 136 Ill. App. 368, a parcel delivery company was declared to be a common carrier. So a city express company engaged in carrying parcels and trunks to and from passenger depots of various railroads, has been declared a common carrier and must perform its duties under the responsibility of common carriers.[36]

(1) **Carriers of Money and Bank Bills.** No carrier is required to carry every kind of goods. The term "goods," used in connection with the definition of the business of carriage, is interpreted to mean such things as, from usage and custom, mode of conveyance, public professions, character of his particular trade or the manner of conducting it, the carrier holds himself out to the public as ready to carry for hire.[37]

No carrier undertakes to carry all kinds of goods, but only such as are of the description which he professes to carry. So it has been held that a common carrier is not liable as such, where, by special engagement or as a matter of accommodation merely, he undertakes to carry a class of goods which it is not his business to carry.[38]

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(36) Richards vs. Westcott, 15 N. Y. Sup. Ct. 589; Parmalee vs. Lowitz, 74 Ill. 116; Moore on Common Carriers, 2d ed., Vol. I, chap. III, sec. 9, pp. 38 to 44, and cases cited in footnotes 47a to 70a, both incl.

(37) Hutchinson Carriers, 3d ed., Vol. I, chap. II, sec. 90, pp. 86 and 87.

(38) Kimball vs. Railroad, 26 Vt. 249; Honeyman vs. Railroad Co., 13 Oreg. 352; Central R. R., etc., Co. vs. Lampley, 76 Ala. 357; Railroad vs. Wallace, 24 U. S. App. 589, 14 C. C. App. 257, 66 Fed. 506, 30 L. R. A. 161; Hutchinson Carriers, 2d ed., Vol. I, chap. II, sec. 59, p. 56.

"The weight of authority," says Moore on Common Carriers, "is in favor of the proposition that there is no presumption that an ordinary carrier, a common carrier engaged in the transportation of goods, wares, and merchandise, assumes to act as a common carrier in respect to the transportation of money, and that the assumption of such liability must be proven by one who would hold the carrier responsible," citing **Kuter vs. Michigan Central R. R. Co.,** 1 Biss. (U. S.) 35, 14 Fed. Cas. No. 7955, 1 Pittsb. Leg. J. (Pa.) 30, 10 West L. J. 416.[39]

In **Citizens Bank** vs. **Nantucket Steamboat Co., supra,** it was held that the liability of the carrier for loss of bank-bills depends upon the fact whether or not he received the bills to carry for compensation, citing **Kirtland** vs. **Montgomery, 1 Swan** (Tenn.) 452.

Again, says Moore, "a carrier may be a common carrier of money, as well as of other property, but it must be shown that the carrier made the carriage of money a part of its ordinary or general business or that it was its general custom or usage to receive and transport packages of money or bank-bills for hire, or that it became such a carrier by reason of a special contract. In order to make a carrier liable as a common carrier of money, notice should be given that the package contains money, if the carrier does not customarily transport money for hire. But if the general custom or usage of the carrier be established by the proof, the carrier will be liable as an insurer for losses occurring otherwise than through the excepted risks. The carrier will not be liable as an insurer, how-

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[39] Citizens Bank vs. Nantucket Steamboat Co., 2d Story (U. S.) 16; Lee vs. Burgess, 9 Bush. (Ky.) 652, holding that it must be clearly proved that they had held themselves out to the public as common carriers of bank-bills for hire, and that they had authorized the master to contract on their account, and not on his own, for the carriage thereof.

ever, if the transportation is not for hire. In such a case, the carrier is a mere mandatory or gratuitous bailee, liable for loss only by reason of its gross negligence. The carrier's duty to inquire as to the value of property offered for transportation, the shipper's duty to state the character and value of the goods, and the effect of fraudulent concealment or misrepresentation of the character or value of the shipment" are questions apart from that of common carriership.[40]

§ 10. Warehousemen, Wharfingers, and Forwarding Merchants.

Warehousemen, wharfingers, and forwarders of freight are not common carriers so long as they remain within the business which their names import. The business of warehouseman and wharfinger is to receive and store goods and merchandise or to ship them to their destination for hire. A wharfinger is one who keeps a wharf for the purpose of receiving and shipping merchandise to or from it for hire. So wharfingers who describe themselves as such and also as lightermen and carmen, and who carry

(40) White vs. Postal Telegraph & Cable Co., 25 App. Cas. (D. C.) 364, 33 Wash. L. Rep. 295, 4 A. & E. Ann. Cas. 767; Chicago & A. R. Co. vs. Thompson, 19 Ill. 578; Chesapeake & Ohio R. R. Co. vs. Hall, 136 Ky. 359, 124 S. W. 372; Sulakowski vs. Flint, 22 La. Ann. 6; Sewall vs. Allen, 6 Wend. 335; Gilman vs. Postal Telegraph Co., 48 Misc. Rep. 372, 92 N. Y. Supp. 564; Butler vs. Basing, 26 C. & C. 613, 12 E. C. L. 764; Kemp vs. Coughtry, 11 Johns. (N. Y.) 107; Sandford vs. American Telegraph Co., 13 Misc. Rep. (N. Y.) 88, 34 N. Y. Supp. 144; Platt vs. Lecocq, 150 Fed. 391 (U. S. C. C., S. C., 1906); Garey vs. Meagher, 33 Ala. 630; Hosea vs. McCrary, 12 Ala. 349; Knox vs. Revis, 14 Ala. 249; Cincinnati, etc., Mail Line vs. Boal, 15 Ind. 345; Robertson vs. Kennedy, 2 Dana (Ky.) 430; Dwight vs. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Chouteau vs. Steamboat St. Anthony, 16 Mo. 260; Elkins vs. Boston, etc., R. R. Co., 23 N. H. (3 Fost.) 275; Farmers', etc., Bank vs. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Powell vs. Mills, 30 Miss. 231, 64 Am. Dec. 158; Hayes vs. Wells, 23 Cal. 185; American District Telegraph Co. vs. Walker, 72 Md. —, 20 Am. St. Rep. 479, 20 Atl. 1; Haynie vs. Waring, 29 Ala. 263; Moore on Common Carriers, 2d ed., Vol. I, chap. X, secs. 36, 37 and 38.

goods from their wharf for their wharf customers, but not for strangers unless at arranged prices, and unless they consider the business good, are not carriers, or, at least, not common carriers. If warehousemen, wharfingers, or forwarders of freight combine the two characters, treating the deposit with them as being merely for the convenience of the carriage or to encourage or promote their business as common carriers, they are held to strict liability as such from the time of the delivery to them. In such cases the deposit is a mere accessory to the carriage. It is made for the purpose of facilitating the carriage and the liability as carrier begins with the receipt of the goods thereof.[41]

It is well settled, however, although a wharfinger may accept goods for the purpose of being transported, if the goods so accepted are those only of his own wharf customers, the goods of strangers not being received, he is not, as to such goods, a common carrier and can not be held liable as such.[42]

If the goods are not to be shipped in the regular course of business, but are to be retained to await the orders of the shipper, the carrier's liability is that of a warehouseman until the orders making it a common carrier are received by it. So if anything remains to be done by the shipper, after the delivery of the goods for transportation, the warehouseman, wharfinger, or forwarder of freight is responsible only as a warehouseman until the conditions have been performed which had the effect of suspending the transportation, and thereafter the liability of the carrier, as an insurer, commences.[43]

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(41) Schloss vs. Wood, 11 Colo. 287; Railway Co. vs. Nichols, 9 Kan. 252, 253; Story on Bailments, sec. 536; Forward vs. Pittard, 1 P. R. T. R. 27; Hutchinson Carriers, 3d ed., Vol. I, chap. II, sec. 71, p. 68.

(42) Chattock & Co. vs. Bellamy & Co., 64 L. J. Q. B. 250.

(43) Wade vs. Wheeler, 3 Lans. (N. Y.) 201, Basnight vs. Atlantic, etc., R. R. Co., 111 N. C. 592.

A forwarding merchant or forwarder, it has been held by the courts, is one who ships or sends forward goods for others to their destination by the employment of third persons, without the forwarding merchant or forwarder incurring the liability of a carrier to deliver them. Such a definition of a forwarding merchant or forwarder neither includes a consignor shipping goods nor a carrier engaged in transporting them.[44]

A forwarder of goods may take upon himself all the expense of transportation, and receive a compensation from the owner therefore, but having no concern in the means of transportation, or interest in the freight, he is not a common carrier, being liable merely as a warehouseman.[45]

It was held in **Ingram** vs. **American Forwarding Co.**, 162 Ill. App. 476, that where an alleged forwarding agent who receives goods for transit, issued bills of lading, and makes contracts in his own name with a railroad company for carriage, such agent is, as to a person with whom he contracts for the delivery of the goods, a common carrier, and liable for such.

In **Dixon** vs. **Railway**, 110 Ga. 173, 35 S. E. Rep. 369, it was held that if the carrier should require the prepayment of freight charges as a condition to his assuming any obligation in respect to transporting the goods, and they were placed in cars standing on a spur track from which place it was necessary to move them to a freight depot to be weighed in order to compute the proper charges, the delivery of the goods for transportation shall be treated as having been made at the freight depot, and the carrier's

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(44) In re Emerson, Marlow & Co., 199 Fed. 95, 117 C. C. A. 639.

(45) Story on Bailments, sec. 502; Roberts vs. Turner, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; Platt vs. Hibbard, 7 Cow. (N. Y.) 297; Wade vs. Wheeler, 3 Lans. (N. Y.) 201.

liability, until the goods are weighed and the charges paid, shall be that of a warehouseman.

Compare with this rule **Schmidt** vs. **Railway Co.,** 90 Wis. 504, 63 N. W. Rep. 1057, holding that where an agent of a steamboat company informed a prospective passenger that it would be advisable for her to forward her baggage to the steamer a few days in advance of the time of sailing, and that it would be placed in her stateroom as soon as received, and the baggage was sent as directed, but for temporary convenience was placed in a storehouse where it was destroyed by fire, the steamship company was responsible as a common carrier for the loss, citing **North German Lloyd S. S. Co.** vs. **Bullen,** 111 Ill. App. 426.

§ 11. Street Railways.

Street railways are common carriers of passengers, and of goods and merchandise where they also assume the business of transporting goods for hire.[46]

§ 12. Telegraph and Telephone Companies.

The holdings of the courts relating to the carrier-status of telegraph and telephone companies have not been uniform, but it may be well said that the decisions favor the view that telegraph and telephone companies are not common carriers. Where it has been held that these agents of transmission are common carriers, it has been reasoned that they are such because they hold themselves out to the public as engaged in a particular branch of business in which the interests of the public are con-

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[46] Citizens Railway Co. vs. Twiname, 111 Ind. 587; Spellman vs. Transit Co., 36 Nebr. 890, 55 N. W. Rep. 270, 38 Am. St. Rep. 753, L. R. A. 316; Pray vs. Railroad Co., 44 Neb. 167, 62 N. W. Rep. 447, 48 Am. St. Rep. 717; Railway Co. vs. Godola, 50 Neb. 906, 70 N. W. Rep. 491; Levi vs. Railroad Co., 11 Allen 300.

cerned and that there is no difference "in the general nature of the legal obligation of the contract" between carrying a message along a wire and transporting a package along a route. Such decisions concede that the physical agency may be different but hold that the essential nature of the contract is the same. This was the reasoning in **Parks** vs. **Alta California Tel. Co.,** 13 Cal. 422, 73 Am. Dec. 589. These earlier decisions of the courts holding telegraph companies to be common carriers have, in certain instances, been statutorily enacted into law. **Kirby** vs. **W. U. Tel. Co.,** 4 S. D. 105, 55 N. W. 759, 46 A. S. R. 765, 30 L. R. A. 612.

In **Telegraph Co.** vs. **Texas,** 105 U. S. 460, the United States Supreme Court held "a telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods."

In addition to this ruling by the Supreme Court of the United States, the Act to Regulate Commerce, sec. 1, as amended in 1910, provides, that the provisions of the act shall apply to "telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory or district of the United States, to any other state, territory or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act." This provision of the Commerce Act, of course, does not apply "to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory, as aforesaid."

Referring to the case of **Telegraph Company** vs. **Texas, supra,** Hutchinson, on Carriers, says:

> "And, certainly, though they can not be regarded strictly as common carriers in the sense which the

> phrase 'common carrier' had previously juridically acquired, yet in their relations to the public, in their duty to serve all impartially, in their duty to avoid discrimination, if not in their responsibility for accurate transmission of messages they occupy a position very closely analogous to that of common carriers."[47]

The preponderant view of the courts, apart from the statutory-status given to telegraph, telephone and cable companies in the Act to Regulate Commerce, is that telegraph companies are not common carriers, nor liable as such. They are, of course, liable for failure to exercise due care. Like common carriers, telegraph and telephone companies are in the exercise of a public calling and under obligation to serve all who may wish to employ them within the scope of their business. But in the opinions of the courts the difference between the transmission of intelligence by means of electricity and the transportation of goods is so great that telegraph and telephone companies may not be said to be common carriers nor subject to the principle of public policy which imposes upon common carriers the exceptional liability of insurers.[48]

(1) **Companies Supplying Messenger Service.** Telegraph companies, in addition to their telegraph service, maintain staffs of messenger boys whose services they furnish to their patrons and others needing them, and for which a charge is made based upon the time of the messenger employed, but such telegraph companies are not

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(47) Hutchinson on Carriers, 3rd ed., Vol. I, Chap. III, sec. 95, pp. 90-92, and cases cited in footnotes 33 and 34.

(48) Am. Rpd. Tel. Co. vs. Conn. Tel. Co., 49 Conn. 352, 44 Am. Rep. 237; Grinnell vs. W. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Gillis vs. Western U. Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 A. S. R. 917, 4 L. R. A. 611; W. U. Tel. Co. vs. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Smith vs. W. U. Tel. Co., 83 Ky. 104, 4 A. S. R. 126.

common carriers as to the services rendered by the messengers.[49]

§ 13. Pipe Lines for Carrying Oil.

The Act to Regulate Commerce, section 1, as amended by the Act of June 29, 1906, provides that pipe lines for the transportation of oil or other commodity, except water and except natural and artificial gas, are common carriers within the meaning and purposes of the Act.

In certain of the states, notably Texas and Kansas, pipe lines have been declared by statute to be common carriers. While other states may assert this power over pipe lines engaging in the transportation of oil for persons other than the owners thereof, which authority is still open to question, a pipe line company possessing interstate lines on private rights of way, and incorporated as a common carrier under the laws of the state where it is organized, may not necessarily be a common carrier in other states, nor prevented from selling its lines in such states, with the right in the purchaser to use them exclusively in its private business.[50]

§ 14. Proprietors of Grain Elevators.

The elevation of grain as a business is one possessed of a public interest, and it has been held that those who carry on the business of elevating grain occupy a relation to the public analogous to that of common carriers. The right of the state to control the business of elevating grain by public legislation for the common good, requiring them to receive and store grain of persons at and for their law-

(49) Hirsch vs. American Dist. Telegraph Co., 112 App. Div. (N. Y.) 265, 98 N. Y. Supp. 371. Overruling previous decisions by the New York courts.

(50) Prairie Oil & Gas Co. vs. United States, 204 Fed. 798, U. S. Com. Ct.

ful prices, when there is room for it, has been asserted in numerous instances.[51]

§ 15. Water Craft.

Owners of steamboats carrying freight and parcels for hire are common carriers, and subject to their liabilities. Owners of ships which are employed in transporting goods for hire are common carriers, in respect to their liability to the shippers. But a ship owner who carries goods on his ship for hire will not, by reason of his acceptance of the goods, be held liable as an insurer, in the absence of any stipulation to the contrary against everything but the act of God and the public enemy, as is a common carrier.[52]

So a steamship company running a line of steamships between designated points, advertising its sailing-times and accepting general cargo and passengers within certain restrictions is a common carrier. Although to make the owner of a vessel liable as a common carrier, it is not necessary that his trip should be regular between the same points, it being sufficient if he is engaged in carrying for others generally to and from any points; but, in case he keeps his vessel for his own use he is not liable as such carrier, though he hired his vessel to another by special agreement.[53]

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(51) Brass vs. North Dakota, 153 U. S. 391, 39 L. Ed. 757, 14 Sup. Ct. Rep. 857, 4 Inters. Com. Rep. 670; Budd vs. New York, 143 U. S. 517, 36 L. Ed. 247, 45 Sup. Ct. Rep. 468, 5 Am. Ry. & Corp. 610, 4 Inters. Com. Rep. 45; Munn vs. Illinois, 94 U. S. 113.

(52) Crosby vs. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Hale vs. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Brown vs. Clayton, 12 Ga. 564; Allens vs. Sewell, 2 Wend. 327; Bank of Orange vs. Brown, 3 Wend. 158; The Gold Hunter, Fed. Cas. No. 5000, 513 (1 Blatchf. & H. 300); Bell vs. Pidgeon and the Scow No. 1, 5 Fed. 634.

(53) The Montana, 22 Fed. 715; Pennewill vs. Cullen, 5 Har. 238.

It is a well settled rule that the master and owner of a general ship, or steam vessel, carrying goods for hire in internal, coasting, or foreign commerce, is a common carrier. As such, the liability of an insurer against losses, except from irresistible causes, such as the act of God and public enemies, attaches to him.

Thus, steamboats or vessels are common carriers when engaged in the coasting trade, or upon the lakes, bays, sounds, and navigable rivers, transporting goods from one port to another for the general public, for hire. Where they carry both passengers and freight, they are liable as common carriers as to the freight and the baggage of their passengers.[54]

In **American Steamship Co.** vs. **Bryan,** 83 Pa. St. 446, the court held that an ocean steamship company is not responsible as a common carrier or an innkeeper, for the baggage of a passenger, which he keeps in his own possession in his stateroom. In such cases, the steamship company must answer for its negligence like other bailees for hire.

Where a vessel is chartered to transport a specific cargo, it is not a common carrier.[55]

(1) **Owners of Tow-Boats.** Owners of tow-boats or tug-boats engaged in towing other boats or vessels do not assume an obligation to insure the goods affected by the engagement to tow, and are therefore not common carriers. The owners of a tow-boat or towing tug engaged in towing are not liable as carriers, but for reasonable care, caution, and maritime skill in the management of the tow-boat.

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(54) Moore on Common Carriers, 2d ed., Vol. I, chap. III, sec. 29, pp. 74 to 77, and cases cited in footnotes 63 to 68b, both incl.

(55) The Dan (D. C. S. D. N. Y.), 40 Fed. Rep. 691.

In the leading New York case of **Wells** vs. **Steam Navigation Co.**, 2 N. Y. 204, 205, speaking to the question of the carrier-status of towing-boats, the court said:

> "It is a great misnomer to call the defendant common carriers, or carriers of any kind in relation to the business of towing boats. Nor are they bailees of any description; for the property towed is not delivered to them, nor placed within their exclusive custody or control. It remains in the possession and for most purposes in the exclusive care of the owners for their service. There is no bailment within any definition of that term to be found in the book. But whether a bailment or not, it is clear that those who tow boats and vessels are not common carriers of the things towed."

(2) **Carriers by a River Craft.** Freighters and river craft on navigable rivers are common carriers. So, steamboats on inland rivers are common carriers and bound to deliver goods, unless prevented by the act of God or public enemies.[56]

In **Moss** vs. **Bettis**, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1, it was held that a person who undertakes, though only as a casual employment **pro hac vice**, to carry by river, for hire, without special contract, is a common carrier and incurs its responsibility. This rule has been maintained in several of the states, notably Tennessee, New Hampshire and South Carolina, but in New York the courts have held that the owner of the sloop specially employed to make a trip, for a specified compensation, is not a common carrier.[57]

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(56) Williams vs. Branson, 5 N. C. (1 Murph.) 417, 4 Am. Dec. 562; Faulkner vs. Wright, 1 Rice 107; Swindler vs. Hilliard, 2 Rich. Law 286, 45 Am. Dec. 732; Jones vs. Walker, 13 Tenn. (5 Yerg.) 427.

(57) Craig vs. Childress, Pec. (Tenn.) 270, 14 Am. Dec. 751; Johnson vs. Friar, 4 Yerg. (Tenn.) 48; Gordon vs. Buchanan, 4 Yerg.

Contrary to the general rule laid down by the United States courts, certain state courts and the English courts, it was held in **Bussey & Co.** vs. **Mississippi Valley Transportation Co.,** 24 La. Ann. 165, 13 Am. Rep. 120, that a tow-boat used in towing barges or other water craft, loaded with freight, between points on the Mississippi River, was a common carrier.

In California, North Carolina and New Jersey, owners of tow-boats have also been held to be common carriers.[58]

(3) **Ferrymen, Lightermen and Hoymen.** A ferryman is one employed in taking persons or property across a river or other stream, in boats or other contrivances, at a ferry or continuation of the highway from one side of the water from which it passes to the other. Travelers with their teams and vehicles and such other property as they may carry or have with them, and passengers, may pass over such ferry. Where ferrymen operate under a franchise, and do nothing but a ferry business, and property is always transported only with the owner or custodian thereof present, and it is well settled that if the owner retains control of the property in himself, and does not surrender the charge of it to the ferryman, the latter is

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(Tenn.) 71; Turney vs. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Moses vs. Norris, 4 N. H. 304; Elkins vs. Boston, etc., R. Co., 3 Fost. (N. H.) 275; McClure vs. Hammond, 1 Bay (S. C.) 99; McClure vs. Richardson, Rice (S. C.) 215. See also: United States vs. Power, 6 Mont. 271, 12 Pac. 639, holding that where the contract of a carrier for the United States, to transport certain goods to points in Montana, contained the clause, "No river risk on the part of the contractor for unavoidable accidents," and, while the goods were being transported up a river, they were burned with the steamer, it was held that person so contracting was but a private carrier, whose liabilities were limited, and he was only bound to the exercise of ordinary care, and that loss by fire on board the steamer transporting the goods fell within the exemption from liability for loss by "river risks" incorporated in the contract.

[58] White vs. Tug Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Walston vs. Myers, 5 Jones. L. (N. C.) 172; Ashmore vs. Pennsylvania, etc., Co., 28 N. J. L. 180.

not a common carrier. He is only responsible for actual negligence.[59]

Where ferrymen combine, as they usually do, the ferry business with that of a common carrier carrying freight and merchandise without the presence of the owner or custodian, they are, as to such freight, under the duties and obligations of a common carrier.[60]

Ferrymen are under a public duty to transport with suitable care and intelligence all persons with or without their vehicles and other property. Where they operate as common carriers, it is their duty to carry all freight and merchandise delivered to them.[61]

The owner of a private ferry may so use it as to subject himself to the liability of a common carrier, if he undertakes for hire, to transport across the river all persons indifferently, with their vehicles and goods.[62]

In **Meisner** vs. **Detroit, etc., Ferry Co.,** 154 Mich. 545, 15 Det. Leg. N. 826, 118 N. W. 14, it was held that a corporation incorporated under the Mich. Comp. Laws, secs. 6646-6659, to own and operate ferries on a river, which owns and operates an amusement park and steamers for the transportation of persons to and from the park, is not a common carrier while engaged in transporting such persons, and may refuse transportation to anyone at its leisure.

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[59] Brodnox vs. Baker, 94 N. C. 675; Wyckhoff vs. Queens County Ferry Co., 52 N. Y. 35, 7 Am. Rep. 650; White vs. Winnisimmet Co., 7 Cush. (Mass.)

[60] Wyckhoff vs. Queens County Ferry Co., 52 N. Y. 35, 11 Am. Rep. 650; Clark vs. Union Ferry Co., 35 N. Y. 485; Harvey vs. Rose, 26 Ark. 3; Saunders vs. Young, 1 Head (Tenn.) 219; White vs. Winnisimmit Co., 7 Cush. (Mass.) 155; Joy vs. Winnisimmet Co., 114 Mass. 63; Garner vs. Green, 8 Ala. 96; Willoughby vs. Horridge, 12 C. B. 742; Mayor, etc., of N. Y. vs. Stairn, 106 N. Y. 1.

[61] Mayor, etc., of N. Y. vs. Stairn, 106 N. Y. 1.

[62] Littlejohn vs. Jones, 2 McMul. (S. C.) 366, 39 Am. Dec. 132.

A lighterman or hoyman is one who carries goods between wharves and ships, and if he carries for any persons who choose to employ him, he is a common carrier.[63]

Where a lighter is hired exclusively to convey the goods of one person to a particular place for an agreed compensation, the lighterman is not a common carrier with respect to such goods, but a private carrier. His liability therefore is only as a bailee for hire. This is the rule of the American courts of admiralty.[64]

(4) **Canal Companies.** A canal company operating a canal for profit, and offering the same to public navigation upon payment of tolls, is not a common carrier. There is no consideration of public policy to enlarge the liability of the owners of a canal beyond the employment of reasonable diligence. Unless they own the canal boats, they can reap no real benefit from either the simulated or real destruction of them or their cargoes, and, therefore, there is no reason for putting them on a footing with common carriers so as to render them insurers.[65]

(5) **Owners of Canal Boats.** The owner of a canal boat employed in transporting property for hire is a common carrier.[66]

In Flautt vs. Lashley, 36 La. Ann. 106, it was held that a boat used by its owners for their own purposes and those of others who agreed to pay certain rates for the transportation of their goods from one point to another, and

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(63) Ingate vs. Christie, 3 C. & K. 61.

(64) Wildenfels, 161 Fed. 864; Rover, 161 Fed. 864; Fish vs. Chapman, 2 Ga. 353, 46 Am. Dec. 393.

(65) Weitner vs. Delaware & Hudson Canal Co., 27 N. Y. Sup. Ct. (4 Rob.) 234; Exchange Fire Insurance Co. vs. Delaware & Hudson Canal Co., 25 N. Y. Sup. Ct. (10 Bosw.) 180; Pennsylvania Canal Co. vs. Burd, 90 Pa. St. 281, 35 Am. Rep. 659; Watts vs. Savannah, etc., Canal Co., 64 Ga. 88, 37 Am. Rep. 53.

(66) Arnold vs. Halenbake, 5 Wend. 33; Spencer vs. Daggett, 2 Vt. 92.

which was held out as a common carrier, can not be declared to be such at the instance of one of the agreeing parties.[67]

It is well settled that the owners of canal boats engaging in the transportation of goods or other property, for hire, are common carriers, when they hold themselves out as willing to carry for all persons indifferently.[68]

(6) **Owners of a Toll Bridge.** The owner of a toll bridge is not a common carrier. The franchises and powers of building, maintaining, and operating a bridge and approaches, designated as its terminal facilities, do not, in and of themselves, constitute the bridge company a common carrier of property; nor do they, by any clear implication, confer upon it authority to "equip its road, and to transport goods and passengers thereon, and charge compensation therefor." Where a railroad company by contract with the bridge company, acquires the right to use it with its approaches, for its engines, cars, and trains, it is regarded, under the Act to Regulate Commerce, section 1, as the owner or operator of the bridge and approaches, for the time being, as to all freight transported by it over the bridge. And as to all such traffic, it, and not the bridge company, must be regarded as the common carrier.[69]

The duty of the owner of a toll bridge, having no possession or control over the goods, is to keep the bridge in proper condition for the safe passage of passengers and goods, and his liability is only for negligence in so keeping it.[70]

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(67) Beckwith vs. Frisbie, 32 Vt. 559; Fish vs. Clark, 42 N. Y. 122.

(68) Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 17, pp. 53 and 54, and cases cited in footnote 55.

(69) Kentucky & I. Bridge Co. vs. Louisville & N. R. Co. (C. C. D. Ky.), 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 351.

(70) Grigsby vs. Chappell, 5 Rich. (S. C.) 443.

(7) **Irrigation Company.** An irrigation company, drawing upon the waters of a public stream, and supplying the same, under contract, to land owners having no prior rights in the waters of such stream, is not a common carrier. Such a company becomes the proprietor of the water, has the right to sell, transfer, and deliver the same, and such right can only be defeated by a subsequent failure to apply it to a beneficial use.[71]

(8) **Log-Carrying, Log-Driving, or Boom Companies.** One who contracts to cut a lot of timber and transport it to a place where it is to be delivered and used, does not act, while transporting the timber, as a common carrier, and incur responsibility as such; he is only liable for the want of ordinary care and skill. A boom company, engaged in the business of driving and booming logs, or for any reason having logs to be driven, and charging regular rates therefor, is not a common carrier, nor subject to the common-law liabilities of carriers.[72]

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(71) Wyatt vs. Larimer & W. Irrig. Co., 1 Colo. App. 480, 29 Pac. 906; Landers vs. Garland Canal Co., 52 La. Ann. 1465, 27 So. 727; Souther vs. San Diego Flume Co., 121 Fed. 347, 57 C. P. A. 561; Boyse City Irrig., etc., Co. vs. Clark, 131 Fed. 415; State vs. Washington Irrig., 41 Wash. 283, 83 Pac. 308, 111 Am. St. Rep. 1019.

(72) Moore on Common Carriers, 2d ed., Vol. I, chap. II, sec. 36, pp. 86 and 87, and cases cited in footnotes 91, 91a and 91b; Pike vs. Nash, 3 Abb. App. Dec. (N. Y.) 610, 1 Keyes (N. Y.) 335; Mann vs. White River Log & Booming Co., 46 Mich. 38, 8 N. W. 550, 41 Am. St. Rep. 141; Chesley vs. Mississippi & Boom Co., 39 Minn. 83, 38 N. W. 769.

CHAPTER III.

CARRIER'S PUBLIC EMPLOYMENT.

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§ 1. Extent and Character of Duty to Serve All.

Common carriers must serve the public by carrying indifferently for all who may employ them. They must perform this duty without discrimination and theoretically at least in the order in which the application is made.[1] They are bound to receive and transport all freight tendered, according to the custom and usage of their business,[2] but they may restrict their business so as to exclude particular classes of traffic. Thus, a common carrier is not bound to receive dangerous articles, such as high explosives of the character of nitroglycerine, dynamite, gunpowder, oil of vitriol, matches, percussion caps, etc.[3] Carriers may impose conditions with reference to the carriage of such articles which amount to a discrimination as between them and ordinary goods and merchandise. But as to the kinds of property which the carrier is in the habit of carrying, it is his specific duty to serve all alike.[4]

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(1) State vs. Cincinnati, etc., R. Co., 47 Ohio St. 130, 158, 23 N. E. 928, 7 L. R. A. 319. See also: Ayres vs. Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226; Doty vs. Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773; Atchison, etc., R. Co. vs. Denver, etc., R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. Ed. 291; Walker vs. Jackson, 10 M. & W. 161, 16 L. J. Exch. 165.

(2) Illinois Central R. Co. vs. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Galena, etc., R. Co. vs. Rae, 18 Ill. 488, 68 Am. Dec. 574.

(3) California Powder Works vs. Atlantic & P. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648; People vs. Babcock, 16 Hun (N. Y.) 313.

(4) Cumberland Telephone, etc., Co. vs. Texas, etc., R. Co., 52 La. Ann. 1850, 28 So. 284; Louisville, etc., R. Co. vs. Queen City Coal Co., 13 Ky. L. Rep. 832; Milwaukee Extract Co. vs. Chicago, etc., R. Co., 73 Iowa 98, 34 N. W. 761; State vs. Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706; Bluthenthal vs. Southern R. Co., 84 Fed. 920.

Favors and preferences are to be avoided. A common carrier cannot carry for one and refuse to carry for another. A railroad is without right to grant privileges where the public is concerned.[5] This does not mean, however, that a railroad company is bound to receive goods at a point on its line where it has no facilities for receiving them.[6]

The duty of a common carrier to accept and carry indefinitely for all who may employ him is imposed by law and arises out of the relation the carrier sustains to the public. It is not, therefore, necessary in an action against a carrier for a refusal to carry, to allege or prove any special contract to carry.[7] Since a common carrier has no right to receive the goods except for transportation, a receipt for the goods in the ordinary form implies an agreement to transport them to their destination if it is on the carrier's line.[8]

§ 2. Transportation Required by Interstate Regulation.

The Act to Regulate Commerce provides that the term "transportation" shall include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported."

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(5) Id.

(6) Oxlade vs. Northeastern R. R., 15 C. D. & S. 680, 109 E. C. L. 680; Johnson vs. Midland R. Co., 4 Exch. 367, 18 L. J. Exch. 366, 6 R. & Can. Cas. 61.

(7) Doty vs. Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773; Adams Express Co. vs. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510. See also: Fleming vs. Mills, 5 Mich. 420.

(8) Landes vs. Pacific R. Co., 50 Mo. 346, 3 Am. Ry. Rep. 288.

See also "Interstate Commerce Law," Vol. I, chap. VI, secs. 7, 8, 9, and 10, ante.

§ 3. Goods Offered by Connecting Lines.

It is the duty of a common carrier not only to accept and carry all goods properly tendered by individuals or private shippers, but also when offered by a connecting carrier. A railroad company receives unusual powers and privileges from the state and is held to a correspondingly high duty. Its public undertaking is to carry any and all kinds of freight indifferently, thereby becoming a quasi-public highway. It cannot refuse to carry freight tendered to it save in exceptional cases.[9] It has no right to refuse to deliver or receive from a connecting line the cars of such line, either empty or loaded, or freight of any kind which is ordinarily transported between railroad companies according to the proper and usual course of business.[10] And this duty on the part of the carrier, where its breach is a continuing one, may be enforced by mandatory injunction.[11] This remedy is not confined to the acceptance of freight or cars from a connecting line. But where a railroad company refuses to discharge this duty to receive and carry freight, a mandamus may issue, at

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[9] Olcott vs. Fond du Lac Co., 16 Wal. (U. S.) 678; Charles River Bridge vs. Warren Bridge, 11 Pet. (U. S.) 420; Bradley vs. New York, etc., R. Co., 21 Conn. 294; Burlington, etc., R. Co. vs. Stearman, 12 Iowa 117; Central Military Track R. Co. vs. Rockafellow, 17 Ill. 541; Worcester vs. Western R. Corp., 4 Met. (Mass.) 564; Weir vs. St. Paul, etc., R. Co., 18 Minn. 155; National Docks R. Co. vs. Central R. Co., 32 N. J. Eq. 755; Messenger vs. Pennsylvania R. Co., 37 N. J. L. 531; 18 Am. Rep. 754; Rogers Locomotive, etc., Works vs. Erie R. Co., 20 N. J. Eq. 379; People vs. New York Central, etc., R. Co., 28 Hun (N. Y.) 543, 9 Am. & Eng. R. Cas. 3.

[10] Beers vs. Wabash, etc., R. Co., 34 Fed. Rep. 244, 35 Am. & Eng. Fed. Cas. 646; Chicago, etc., R. Co. vs. Burlington R. Co., 34 Fed. Rep. 481, 35 Am. & Eng. R. Cas. 650.

[11] Chicago, etc., R. Co. vs. Burlington, etc., R. Co., 34 Fed. Rep. 481, 35 Am. & Eng. R. Cas. 650; Payne vs. Kansas City R. Co., 46 Fed. Rep. 546, 47 Am. & Eng. R. Cas. 235.

the instance of the state, to compel a discharge of such duty.[12]

§ 4. Through Rates.

Two sources of authority now affect the discharge of the common carrier's duty to accept and carry goods tendered to it, viz., the common law and government regulations. At common law a carrier is bound to accept goods only over its own line. Nor may it be compelled to employ other carriers as its agent to carry beyond the terminus of its own line. So at common law, common carriers cannot be required to establish with other carriers through routes and joint rates,[13] but under the authority of government regulations both the state and federal government are empowered to compel the establishment, maintenance, and operation of through routes and joint rates.[14]

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(12) People vs. New York Central, etc., R. Co., 28 Hun (N. Y.) 543, 9 Am. & Eng. R. Cas. 1; Union Pacific R. Co. vs. Hall, 91 U. S. 343; State vs. Hartford, etc., R. Co., 29 Conn. 538; Ex p. Atty.-Gen., 17 New Bruns. 667; Railroad Commissioners vs. Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; People vs. Colorado Central R. Co., 42 Fed. Rep. 638, 45 Am. & Eng. R. Cas. 599.

(13) Atchison, etc., R. Co. vs. D. & No. R. R. Co., 110 U. S. 67.

(14) Act to Regulate Commerce, as amended, sec. 1, par. 2, providing that "it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operating of such through routes, and providing for reasonable compensation to those entitled thereto."

Act to Regulate Commerce, as amended, sec. 15, par. 3, providing that "the Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish routes and joint classifications, and may establish joint rates as the maximum to be charged, and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water-line. The Commission shall not, however, establish any through route, classification, or rates between street electric passenger railways not engaged in the general business

In the Elevator and Stock Yard Cases[15] it was held that a railroad company may not discriminate between elevators which may be reached from its lines, or by agreement undertake to deliver grain in bulk at one elevator and at the same time refuse to accept it for delivery at another.

Where a railroad company has contracted with another stock yard company to deliver to it all live stock transported to that place, it cannot by such contract restrict itself to deliver to a particular company furnishing facilities for the handling of live stock.

§ 5. Prepayment of Charges as Condition Precedent to Transportation Service.

It has been held at common law that a carrier may make prepayment of freight charges a condition of furnishing transportation.[16] This right may be offset only where a long usage on the part of the carrier is shown, whereby all shippers were allowed to ship their goods and have the charges collected at destination.[17]

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of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, or rates, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water."

[15] Chicago, etc., R. Co. vs. People, 56 Ill. 365, 8 Am. Rep. 690; People vs. Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631; Pittsburgh, etc., R. Co. vs. Morton, 61 Ind. 539, 28 Am. Rep. 682; Covington Stock Yards Co. vs. Keith, 139 U. S. 128, 11 S. Ct. 128, 25 L. Ed. 73, holding that notwithstanding the railroad company has a contract with another stock yard company to deliver to the latter all live stock transported to that place, it cannot by such contract restrict itself to delivery to a particular company furnishing facilities for the handling of live stock.

[16] Illinois Central R. Co. vs. Frankenberg, 74 Ill. 88, 5 Am. Rep. 92; Galena, etc., R. Co. vs. Rae, 18 Ill. 488, 68 Am. Dec. 574; Wilder vs. St. Johnsbury, etc., R. Co., 66 Vt. 636, 30 Atl. 41.

[17] Reed vs. Philadelphia, etc., R. Co., 3 Houst. (Del.) 176.

§ 6. What Excuses Failure or Refusal to Carry?

While the rule is properly stated that a common carrier must carry indifferently the goods of all who may choose to employ him, nevertheless there are conditions which may be properly offered in excuse of the carrier's failure or refusal to carry. Reasonable limitations of the duty to carry may be imposed by the carrier, such, for instance, if the goods are not of the character which the carrier transports.[18] He may establish reasonable regulations as to time, nature of goods, and mode of carriage of the goods he professes to carry,[19] or he may limit his undertaking to the carriage of a certain character of goods to their transportation only in a certain way, refusing to carry them under any other conditions.[20] So the carrier may refuse to receive goods offered for transportation defectively packed, so that from their character and the nature of their transportation journey extra risk would be entailed and therefore extra care required.[21]

A carrier may refuse to carry goods not tendered at a proper place, or unless delivered at the carrier's depot, the prescribed time before the departure of a certain train.[22] He has a right to refuse articles offered of a dangerous

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[18] Johnson vs. Midland R. Co., 4 Exch. 367; 6 Railw. Cas. 61, 1 Ry. & Ct. Cas. 16; Oxlade vs. North Eastern Ry. Co., 15 C. B. & S. 680, 109 E. C. L. 680.

[19] Oxlade vs. North Eastern R. Co., 1 C. B. & S. 454, 87 E. C. L. 454, 15 C. B. & S. 680, 109 E. C. L. 680, 9 W. R. 272.

[20] Thomas vs. North Staffordshire R. Co., 3 Ry. & Ct. Cas. 1, 21 Sol. Jour. 183; Lake Shore, etc., R. Co. vs. Perkins, 25 Mich. 329, 12 Am. Rep. 275.

[21] Fitzgerald vs. Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341; Union Express Co. vs. Graham, 26 Ohio St. 595; Munster vs. South Eastern R. Co., 4 C. B. & S. 676, 93 E. C. L. 676, 27 L. J. C. P. 308; Hart vs. Baxendale, 16 L. P. N. S. 390, 6 Exch. 769, 16 Jour. 126; Missouri Pac. R. Co. vs. Weisman, 2 Tex. Civ. App. 86.

[22] Palmer vs. London, etc., R. Co., L. R. 1 C. P. 588; Lane vs. Cotton, 1 Ld. Raym. 652.

character,[23] and when there is reasonable grounds to suspect that the goods offered are of such character and dangerous, he has a right to examine the goods, although this does not give him the right, without reasonable ground for suspicion, to compel the shipper to disclose the character of the goods offered for shipment.[24]

If the carrier has not the means for immediate transportation, he should decline to receive perishable goods for shipment.[25] But this is not the case where other goods of the general nature the carrier professes to carry are offered. Such goods must be accepted and may be subjected only to a reasonable delay because of the carrier not having the means of transportation and must be carried as soon as the facilities of the carrier permit.[26]

§ 7. What Constitutes Refusal to Transport?

In order to render the carrier liable in damages for refusal to carry, there must be a tender of the goods for

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[23] Herne vs. Garton, 2 El. & El. 66, 105 E. C. L. 66, 28 L. J. M. C. 16; George vs. Scivington, L. R. 5 Exch. 1.

Cases holding that the carrier has a right of action against the shipper for any damage resulting from the explosion of such articles shipped without notice of their character, see—Boston, etc., R. Co. vs. Shanley, 107 Mass. 568, 12 Am. L. Reg. N. S. 500; Nitro-glycerine Case, 15 Wall. (U. S.) 524; Brass vs. Maitland, 6 El. & El. 471, 88 E. C. L. 471; Farrant vs. Barnes, 11 C. B. N. S. 553, 103 E. C. L. 553; William vs. East India Co., 3 East 192.

[24] Norfolk, etc., R. Co. vs. Irvine, 84 Va. 553, 85 Va. 217, 37 Am. & Eng. Cas. 227. But these holdings do not deprive the carrier of his right to always demand of the shipper to state the actual value of his goods.

[25] Tierney vs. New York Cent. R. Co., 76 N. Y. 305, affirming 10 Hun (N. Y.) 569, 67 Barb. (N. Y.) 538.

[26] Michigan Central R. Co. vs. Burros, 33 Mich. 6; Branch vs. Wilmington, etc., R. Co., 77 N. Car. 347; Chicago, etc., R. Co. vs. Thrapp, 5 Ill. App. 502; Illinois Cent. R. Co. vs. Cobb, 64 Ill. 128, holding that where a delay occurs in the transportation of goods in consequence of a lack of cars or other facilities, the company is liable for the delay unless it can show good cause therefor.

shipment.[27] This refusal to carry may be made by the agent of the carrier, if such agent is authorized to receive freight for the carrier.[28]

§ 8. Measure of Damages for Refusal to Receive.

Where a carrier or his duly authorized agent refuses to receive property for transportation, the measure of damages recoverable therefor includes the loss occasioned by the delay in securing transportation, cost of keeping the goods during the delay, including expense of delivering the goods a second time for transportation,[29] difference between the value of the goods when tendered for transportation and value at the intended destination, less freight charges,[30] reasonable profits on such goods,[31] loss

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(27) Little Rock, etc., R. Co. vs. Conatser, 61 Ark. 560, 33 S. W. 1057; Houston, etc., R. Co. vs. Campbell, 91 Tex. 551, 45 S. W. 2 L. R. A. 225, holding that to constitute a tender it is not essential that the shipper prepare and offer his freight ready for shipment after the company has refused to furnish him transportation. This ruling must be technically applied, and should not be presumed to commute the rule as stated in the text.

(28) Seasongood, etc., Co. vs. Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270; Lanning vs. Suffex, R. Co., 1 N. J. L. J. 21, holding that refusal by the agent, on the ground of personal animosity between himself and the shipper, will render the carrier liable.

(29) Houston, etc., R. Co. vs. Smith, 63 Tex. 322; Inman vs. St. Louis, Southwestern R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37.

(30) People vs. New York, etc., R. Co., 22 Hun (N. Y.) 533; Inman vs. St. Louis Southwestern R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37; Central, etc., R. Co. vs. Morris, 68 Tex. 49, 3 S. W. 457, holding that if the refusal is not of specific property, but generally to transport a particular kind of property for complainant, market value is immaterial.

Central R. Co. vs. Logan, 77 Ga. 804, 2 S. W. 465, setting forth a state of facts under which loss of complainant's business may be shown.

Chicago, etc., R. Co. vs. Walcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320, holding evidence of fluctuations in market price is admissible.

(31) Louisville, etc., R. Co. vs. Queen City Coal Co., 13 Ky. L. Rep. 832.

of benefit of contract shipper was undertaking to perform by the shipment of the goods.[32] And where the carrier or his agent refuses to receive property for transportation, because of ill-will or disregard of the shipper's right, exemplary damages may be recovered.[33]

§ 9. Mode of Transportation Employed.

When a carrier accepts goods for transportation, it is assumed that the contract calls for transportation by the carrier's usual route.[34] But in the absence of an express contract fixing the mode of transportation, the carrier is at liberty to exercise his own judgment as to the mode of carrying the goods, provided delivery of the goods is effected within a reasonable time.[35]

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[32] Houston, etc., R. Co. vs. Campbell, 91 Tex. 551, 45 S. W. 2, L. R. A. 225. And this holding to the effect that it is immaterial whether the carrier had knowledge of such contract.

[33] Adinger vs. S. Car. R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716.

[34] Hales vs. London, etc., R. Co., 4 B. & S. 66, 116 End. C. L. 66, 11 W. R. 856; Empire Transp. Co. vs. Wallace, 68 Pa. St. 302, 8 Am. Rep. 178, 1 Am. Ry. Rep. 443; Burwell vs. Raleigh, etc., R. Co., 94 N. Car. 451, 25 Am. & Eng. R. Cas. 410.

In Empire Transp. Co. vs. Wallace, 68 Pa. St. 302, 8 Am. Rep. 178, the plaintiff delivered to the defendant's company at Irvineton, Pa., goods to be carried by it to Boston, and receive their bill of lading containing a condition that "This merchandise may be carried in box cars, covered skeleton cars, or on open platform cars; if destined beyond Philadelphia, it may be transported by water, in vessels, boats, barges, or lighters, and if so destined * * * it may be delivered, in the cars of this company or otherwise, to any railroad or transportation company," etc. The usual route of the defendant company was by rail to Philadelphia and thence to Boston by water. It was held that the stipulation was valid, and that the defendant was not bound to send the goods by rail from Philadelphia on because there was a mere temporary obstruction in the water route.

[35] Batson vs. Donovan, 4 B. & Ald. 28, 16 C. L. 376; Barnes vs. Marshall, 18 Q. B. 785, 83 Eng. C. L. 785; Wyld vs. Bickford, 8 M. & W. 443; Bastard vs. Bastard, 2 Show. 81; Fitch vs. Newberry, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33; Randall vs. Richmond, etc., R. Co., 108 N. C. 612, 49 Am. & Eng. Ry. Cas. 75; Missouri Pac. R. Co. vs. Weisman, 2 Tex. Civ. App. 86; Cleveland, etc., R. Co. vs. Perishow, 61 Ill. App. 179.

In Galena, etc., R. Co. vs. Rae, 18 Ill. 488, 68 Am. Dec. 574, it was held that in order to maintain an action against the carrier for refusing to receive and carry its grain, the plaintiff must prove a tender of the customer in freight charges, or a readiness and willingness to pay according to the course and usage of the company, whether that was required to be paid in advance or not. Slight evidence, however, of readiness and willingness to pay is sufficient, and that may be presumed or conferred from surrounding circumstances. Compare Central, etc., R. Co. vs. Morris, 68 Tex. 49, 28 Am. & Eng. R. Cas. 50, where it was held that the plaintiff, in an action against the carrier, for refusing to carry, need not aver a tender of freight charges.

Comstock vs. Affoelter, 50 Mo. 411; Blitz vs. Union Steamboat Co., 51 Mich. 558; New Jersey, etc., R. Co. vs. Pennsylvania R. Co., 27 N. J. L. 100, holding that the carrier cannot, therefore, escape liability for a loss caused by his mode of transporting, unless the character of the property was concealed, thus causing him to adopt a less careful mode.

CHAPTER IV.

FACILITIES FOR TRANSPORTATION.

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§ 1. Duty of Carrier to Acquire and to Furnish Facilities for Transportation.

The common law duty of a common carrier to have and to furnish facilities for transportation, has been statutorially expressed in the Act to Regulate Commerce. At common law the duty is imposed upon a railroad company and similar carriers to have and to furnish facilities for the reasonably prompt transportation of goods tendered to them, and their liability for delay in transporting goods is as much predicated upon the want of facilities, as it is upon wanton refusal to carry.[1]

It was held in Cobb vs. Illinois Cent. R. Co., 38 Iowa 601, that a railroad company is bound to do all that is reasonable and to use all reasonable means, by increasing the number of its tracks and warehouses, to accommodate its increased business, and whether it has done this in given case, is a question of fact, not of law.

And in **Butchers, etc., Stock Yards Co.** vs. **Louisville, etc., R. Co.**, 67 Fed. Rep. 35, 31 U. S. App. 252, the court declared that equity will require a carrier to furnish facilities for loading and unloading live stock, although it may require a supervision of details by the court or its representatives. In **International, etc., R. Co.** vs. **Young** (Tex. Civ. App. 1894), 28 S. W. Rep. 819, it was held that a railroad company is liable to a shipper for damages caused by its delay in furnishing refrigerator cars, although it

(1) Michigan Cent. R. Co. vs. Burrows, 33 Mich. 6; Branch vs. Wilmington, etc., R. Co., 77 N. C. 347; Illinois Cent. R. Co. vs. Cobb, 64 Ill. 128; Chicago, etc., R. Co. vs. Thrapp, 5 Ill. App. 502.

may not own any such cars, where it appears that it had an arrangement with the owners of such cars whereby it can secure them for the use of its shippers whenever needed.

Under the Nebraska statute of July 1, 1887, for the regulation of railroads, the Board of Transportation could institute an action in a proper case, to require a railroad company to grant facilities for the erection of an elevator at one of its stations, to any person engaged or who desired in good faith to engage in the business of receiving, handling, and shipping grain over the railroad. Such facilities need not necessarily be on the company's right of way, but might be near there, unless it appeared that others at various points had been allowed space on the right of ways; then equal facilities had to be granted to all. The company might impose reasonable conditions before granting the privilege, but such conditions should be the same to all persons. This was the holding in **State** vs. **Missouri Pac. R. Co.,** 29 Neb. 550, 42 Am. & Eng. R. Cas. 661. But in **State** vs. **Chicago, etc., R. Co.,** 36 Minn. 402, a similar statute was held unconstitutional.

It is well settled a common carrier is only bound to provide facilities for such transportation as might reasonably be expected in the ordinary course of its business.[2] It is not liable for delay necessitated by sudden

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(2) Marine Ins. Co. vs. St. Louis, etc., R. Co., 41 Fed. Rep. 643, 43 Am. & Eng. R. Cas. 79; Thomas vs. Wabash, etc., R. Co., 63 Fed. Rep. 200; Truax vs. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233; Galena, etc., R. Co. vs. Rae, 18 Ill. 488, 68 Am. Dec. 574; Cobb vs. Illinois Cent. R. Co., 88 Ill. 394; Pittsburgh, etc., R. Co. vs. Racer, 5 Ind. App. 209; Michigan Cent. R. Co. vs. Burrowes, 33 Mich. 6 (Chicago Fire Case); Vicksburg, etc., R. Co. vs. Ragsdale, 46 Miss. 458; 1 Am. Ry. Rep. 407; Faulkner vs. South Pac. R. Co., 51 Mo. 311, 3 Am. Ry. Rep. 293; Bouker vs. Long Island R. Co., 89 Hun (N. Y.) 202; East Tennessee R. Co. vs. Nelson, 1 Cold W. (Tenn.) 276; Houston, etc., R. Co. vs. Smith, 63 Tex. 322, 22 Am. & Eng. Cas. 421; Louisville, etc., R. Co. vs. Touart, 97 Ala. 514, 55 Am. & Eng. R. Cas. 600.

and unusual press of business arising from exceptional causes and which it could not reasonably have anticipated.[3]

§ 2. Duty of Carrier to Have and Furnish Cars.

A common carrier is under no obligation at common law to supply a vehicle of a particular form or description, if such form or description has no reference to the safety of the transportation. So long as the carrier's equipment is adapted to the safe transportation of goods intrusted to it, the right of carrier is not restricted in choosing and selecting the vehicle for transportation which it regards most satisfactory for the conduct of its business.

It is the duty of the carrier at common law to furnish suitable cars whenever reasonably demanded by a shipper, the duty existing by law arising out of the relation which the carrier sustains from the public or out of special contract or statutory requirements.[4]

The statute in the Texas case was merely affirmatory of the common law. Article 4226 of Texas Rev. Stat. provides that, "every such corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto, offer or be offered for transportation at the place of starting, * * * and shall take, transport, and discharge such passengers and property at, from, and to such places on the due payment of the tolls, freight, or fare legally authorized therefor." It was held that this is "merely declaratory of the

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(3) Id.

(4) Houston, etc., R. Co. vs. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421. See also: U. S. vs. P. R. R. Co., — U. S. —.

common law;" that aside from the statute, "it would be the duty of the carrier to provide all necessary facilities and means for transporting such property as might be offered, at least to the extent that would ordinarily be expected to seek transportation by the particular line."

If a special contract has been entered into, the carrier's obligation to furnish cars must be determined by the provisions of the contract itself to the extent that the requirements of such contract are not unlawful or repugnant to public policy.[5] If the agreement is to furnish unconditionally, the carrier can not be heard to excuse his failure by showing an unusual press of business, an unavoidable accident or an act of God.[6] But such contract must be something more than a mere offer and acceptance; there must be some consideration shown by or in the payment of money or in the expenditure of labor upon the faith of the contract, in order to be a binding obligation upon the carrier.[7]

Where a carrier is not required by the contract or order for the cars to furnish them at any particular hour of the day, it may furnish them at any hour of the day it sees fit.[8] In **McGrew** vs. **Missouri Pac. R. Co.,**[9] the contract was for coal cars and they were furnished at 4 o'clock in the afternoon, the hour at which the miners stopped work, so that they could not be used until the next day. It was held that this gave no cause of action against the company.

In many of the states it has been declared by the statute to be the duty of a common carrier to furnish

(5) McGrew vs. Missouri Pac. R. Co., 109 Mo. 582.
(6) Gann vs. Chicago, etc., R. Co., 2 Mo. App. Rep. 1288.
(7) Chicago, etc., R. Co. vs. Dane, 43 N. Y. 240; Riggins vs. Missouri River, etc., R. Co., 73 Mo. 598, 9 Am & Eng. R. Cas. 242; Tilley vs. Cook County, 103 U. S. 155.
(8) McGrew vs. Missouri Pac. R. Co., 109 Mo. 582.
(9) Id.

to shippers facilities for transportation.[10] In the state of Wisconsin the statute required every railroad company to furnish cars upon reasonable notice, when within its power to do so. Under this statute shipper must not only allege and prove that it was within the power of the company to have furnished the car, but must also allege and prove a reasonable notice.[11]

In the interstate system of regulation the Act to Regulate Commerce has transmuted into an obligation under federal law, the common law duty of carrier in this regard.[12]

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(10) Galveston, etc., R. Co. vs. Schmidt (Tex. Civ. App. 1894), 25 S. W. Rep. 452.

(11) Richardson vs. Chicago, etc., R. Co., 61 Wis. 596, 18 Am. & Eng. R. Cas. 530; Rev. Stat. of Wisconsin, sec. 1798; Ayres vs. Chicago, etc., R. Co., 71 Wis. 372, 5 Am. St. Rep. 226, 35 Am. & Eng. R. Cas. 679.

(12) Pennsylvania Paraffin Works vs. Pennsylvania R. R. Co., 34 I. C. C. 179; Vulcan Coal & Mining Co. vs. I. C. R. R., 33 I. C. C. 52; Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. 106; Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. 356; Atchison Ry. Co. vs. U. S. 232, U. S. 199; Boyle vs. P. R. & Ry. Co., 54 Pa. 310.

"It is further argued by the defendant that the requirement of section 1 to furnish transportation upon reasonable request was intended to transmute into an obligation under federal law the common-law obligation of the carrier in this regard, and it is stated that there never was an obligation at the common law to supply a vehicle of a particular form or description when such form or description had no reference to the safety of transportation. Defendant states that so long as the carrier's equipment is adapted to the safe transportation of the goods intrusted to it, there is nothing in section 1 which in any way restricts the right of the carrier to choose and select the vehicle of transportation which it regards most satisfactory for the conduct of its business.

"As bearing upon this point, it should first be stated that defendant holds itself out to transport oil in bulk. It not only publishes rates for the transportation of oil in tank cars, but owns tank cars and supplies shippers with them. It leases cars owned by companies engaged in refining oil and transports their products in those cars at the rates it publishes for the movement by rail of oil in tank cars. It certainly cannot be contended that the transportation by rail of oil in bulk could be attempted safely in any equipment other than tank cars.

"Whatever the obligation of the carriers may have been under the common law, the requirements of the Act are plainly more compre-

hensive than defendant contends. It is, of course, plain that the extent of defendant's obligation at common law is not determinative of its extent under the statute.

"However, in further support of its argument that the requirements of section 1 to furnish transportation upon reasonable request were merely intended to transmute into an obligation under federal law the common-law obligation of the carrier, defendant calls attention to the safety appliance acts, which it is stated indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers it covers the subject by careful specific rules. Defendant argues that if it had been the intention of Congress to endow the Commission with the power to require the purchase of equipment of specialized character Congress would have defined the manner in which and the extent to which this power might be exercised. Attention is also called to the Commission's recommendation, in its last report to Congress, that carriers be required to furnish steel coaches for passenger traffic, and it is argued that this is an admission of its lack of jurisdiction over matters concerning a carrier's equipment. If the Commission can require carriers to furnish tank cars for the movement of oil, defendant contends, it certainly must have jurisdiction to require them to furnish steel passenger coaches.

"The attempted analogy does not exist. The power to require proper and adequate cars for the transportation of passengers, or of oil in bulk, is one thing. The power to require that such cars be of peculiar or especial design, pattern, or material is quite another thing. At common law shippers had a present remedy in the courts by suit for damages in case of a carrier's failure to perform its duty to transport safely. One of the conditions, however, which led to the passage of the Act to Regulate Commerce and the amendments thereto was the inability of shippers to find a present remedy in the case of rates charged for transportation of goods or regulations or practices affecting such transportation which were unjust, unreasonable, or discriminatory. And, as clearly appears from a reading of the provisions which were added by the amendment of 1906, to which reference has been made above, Congress at that time had in mind giving shippers a more adequate remedy in case the facilities for transportation were inadequate.

"It is further contended by defendant that even if the Act to Regulate Commerce declares the duty of carriers to provide special equipment, it does not invest this Commission with power to require the purchase of additional cars. It is stated that while the Commission is charged with the enforcement of the Act to Regulate Commerce its powers in cases coming up for decision after hearing on complaints, as provided in section 13, are fully defined in sections 15 and 16, which authorize the Commission—

> "'* * * to determine and prescribe * * * the just and reasonable * * * rate or rates * * * to be thereafter observed * * *, and what * * * regulation or practice is just, fair, and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall * * * conform to and observe the regulation or practice so prescribed.'

"Defendant contends that the present case involves no rate, regulation, or practice, arguing that if it be a practice within the meaning of the Act for the carrier to furnish only 500 tank cars, it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the Act. Practice, it is contended, connotes a continued method of operation and not merely a single act.

"While the Act does not specify that this Commission should regulate every detail of railroad operation, we are required by its terms to determine whether any rate or any regulation or practice affecting transportation is just, reasonable, and nondiscriminatory. Among other things we are required to decide whether or not in specific cases carriers have complied with the requirements of the Act to furnish adequate facilities upon reasonable request. In **Rail & River Coal Co.** vs. **B. & O. R. R. Co.,** 14 I. C. C. 86, the Commission said:

> "'* * * the words "any regulations or practices whatsoever * * * affecting such rates" are used synonymously with the words "regulation or practice in respect to such transportation;" and * * * both clauses are to be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation. * * *'

"In **Mobile Chamber of Commerce** vs. **M. & O. R. R. Co.,** 23 I. C. C. 417, after calling attention to the provisions of section 1, including the requirement that carriers shall furnish cars upon reasonable request therefor, the Commission said:

> "'* * * Under section 15, as amended in 1910, the Commission is empowered to determine and prescribe what will be the just, fair, and reasonable regulation or practice which shall be thereafter followed by the carrier as to the services which the carrier is required to give under section 1.'

"In **Arlington Heights Fruit Exchange** vs. **S. P. Co.,** 20 I. C. C. 106, after calling attention to the relative advantages of precooling and standard refrigeration in the movement of citrus fruits from California to eastern markets, the Commission said:

> "'Oranges can not be moved in box cars without ventilation. Let us assume that the ventilated car had been unknown and that the entire citrus-fruit crop had moved at all seasons of the year under refrigeration. It is discovered that by the use of a car so constructed that a current of air can be forced through the oranges by the motion of the car, two-thirds of the citrus-fruit crop can be transported without the expense of refrigeration. Could the defendants under these circumstances insist that all oranges should continue to move under refrigeration and would they rest under no obligation to provide ventilated cars?
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> "'* * * This vast tonnage should be handled in the most economical and satisfactory manner, and these carriers should furnish for that movement such cars as will effectuate that purpose. They have a right to insist upon a proper compensation for supplying the equipment, but they have no right to

say that old methods must continue in use and new methods held in abeyance rather than change the form of their cars.

"'The carrier may insist upon furnishing all the equipment which is needed for the movement of precooled shipments and might decline to use equipment furnished by the shippers, but it can not refuse to furnish proper equipment upon fair terms. * * *'

"The carriers who were defendants in this case petitioned the Commerce Court to annul and set aside the Commission's order. The Commerce Court approved the findings of the Commission and dismissed the complaint, whereupon the case was appealed to the United States Supreme Court, which held, **Atchison Ry. Co.** vs. **U. S.,** 232 U. S. 199:

"'Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and can not be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers can not be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another.'

And at page 217:

"'Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers. * * *'

"In **C., R. I. & P. Ry. Co.** vs. **Hardwick Elevator Co.,** 226 U. S. 426, after referring to the provisions of section 1 of the Act requiring carriers to furnish cars upon reasonable request, the United States Supreme Court said:

"'Not only is there a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty. * * *'

"Attention should also be called to the following language used by the Commerce Court in **United States** vs. **L. & N. R. R. Co.,** 195 Fed. 88:

"'This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ of mandamus directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to southeastern terri-

> tory, they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree.'

"The United States Supreme Court has repeatedly stated that the whole scope of the Act to Regulate Commerce shows it to have been intended that this Commission and not the courts shall pass upon administrative questions. **T. & P. Ry. Co.** vs. **Abilene Cotton Oil Co.**, 204 U. S. 426; **B. & O. R. R. Co.** vs. **Pitcairn Coal Co.**, 215 U. S. 481; **Robinson** vs. **B. & O. R. R. Co.**, 222 U. S. 506; **United States** vs. **Pacific & Arctic Co.**, 228 U. S. 87; **P. R. R. Co.** vs. **International Coal Mining Co.**, 230 U. S. 184; **Mitchell Coal & Coke Co.** vs. **P. R. R. Co.**, 230 U. S. 247; **Morrisdale Coal Co.** vs. **P. R. R. Co.**, 230 U. S. 304; **S. Ry. Co.** vs. **Reid**, 222 U. S. 424; all of which are quoted from at length in **Vulcan Coal & Mining Co.** vs. **I. C. R. R. Co., supra.**

"In **T. & P. Ry. Co.** vs. **Abilene Cotton Oil Co.**, 204 U. S. 426, 440, 441, it is stated that if, under the Act to Regulate Commerce, the courts were given jurisdiction to determine the reasonableness of rates the result would be as follows:

> "'* * * if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted.'

"Can it be doubted that if the courts were required to state what demands for cars are reasonable and when a carrier's equipment is adequate a similar lack of uniformity and like confusion would result?

"In **Vulcan Coal & Mining Co.** vs. **I. C. R. R. Co., supra,** we said:

> "'Furthermore, one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the Commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands. Only

The Act to Regulate Commerce imposes upon all common carriers subject to its provisions, the duty of affording, according to their respective powers, "all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith," and they "shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."[13]

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then would this complaint present a question like that considered in **P. R. R. Co.** vs. **International Coal Co., supra.** It may be that after the determination by the Commission of the number of cars which the defendant should have furnished and of the times when it should have furnished them the courts would have concurrent jurisdiction with the Commission of the ascertainment of the damages suffered by complainants by reason of defendant's failure to perform that duty. However, it is not a carrier's duty to furnish all cars demanded at all times. In substance section 1 provides that **upon reasonable request** it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The legal sufficiency of defendant's car supply can not be definitely fixed by the statute. It is a question which, using the language of the court in the **Mitchell Case,** "involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of" this tribunal.'

"One further argument advanced by defendant should be considered in connection with the question of jurisdiction. Defendant states that to require the carrier to purchase additional equipment may involve a demand that the carrier increase its capital account, and the power of the Commission can only properly be determined by a consideration of its right to require such action on the part of the railroads. But such an objection is not sound, because the question of the financial ability of any carrier would be a matter for consideration in judging of the reasonableness of the request for special or additional equipment and would be one of the matters considered by the Commission in judging the particular case when the same arises."—**Pennsylvania Paraffin Works vs. P. R. R., supra.**

[13] Act to Regulate Commerce, as amended, sec. 3, par. 2.

Prior to the 1910 amendment of section 1, of the Act to Regulate Commerce, the Commission had held it the duty of a carrier to furnish an adequate and suitable car equipment for all the business which it undertakes, and also whatever might be essential to the safety and preservation of traffic in transit.[14] The Commission had also declared that the common law and charter duty of every railway company subject to the Act to Regulate Commerce was to furnish a proper and adequate car equipment for all the reasonable needs of the business which the carrier advertises and undertakes to do, and if it fails to do this, to the wrongful injury of the shipper, it is liable in damages therefor.[15]

In the **Paraffin Works Case,** decided May 11, 1915, the Commission gave full expression to furnish all necessary equipment. It held itself to have the power to require of the carriers all necessary equipment both ordinary and special, including oil tank cars. It also held that an adequate car supply is an administrative question, of which it alone can take original jurisdiction, and cars, without regard to ownership, must be distributed without discrimination.[16]

The carrier applied for an injunction against the carrying into effect of the Commission's order requiring it to

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[14] Truck Farmers' Assn., etc., vs. New England R. R. Co., etc., et al., 6 I. C. C. 295.

[15] Scofield vs. L. S. & M. S. R. Co., 2 I. C. C. R. 90, 2 I. C. R. 67, See also: Re Charges for Transportation and Refrigeration of Fruit, 11 I. C. C. R. 129; same matter in 10 I. C. C. R. 360. See also: Act to Regulate Commerce amended, sec. 1, par. 2. See also: Indp. Refrs. Assn. vs. W. N. Y. & P. R. Co., 4 I. C. C. R. 162; Truck Farmers' Assn., vs. New England R. Co., et al., 6 I. C. C. R. 295.

[16] Paraffin Works vs. P. R. R. Co., 34 I. C. C. 179; Crew-Ledick Co. vs. P. R. R. Co., 34 I. C. C. Rep. 179; etc., Broken Bow Mining Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 52; A. T. & S. F. R. Co. vs. U. S., 232 U. S. 199; Arlington Ice & Food Exch. vs. S. P. Co., 20 I. C. C. Rep. 106.

acquire and furnish tank cars, and a special federal court for the western district of Pennsylvania denied the existence of the authority undertaken by the Commission. On December 11, 1916, the Supreme Court of the United States, on appeal from the judgment of the special court, affirmed the latter's ruling, holding that the Commission is without power to require carriers to furnish tank cars for oil refineries or equipment of any special kind for any industry or shipper. The power to make such orders, if it exists, said Justice McKenna, does not reside in the Interstate Commerce Commission.

The Supreme Court's decision in the Tank Car Case put the whole matter in the status it occupied prior to the decision of the Commission, a situation which prevailed immediately after the Commission's decision in the Scofield Case, supra, in which it held it had not power to require a carrier to furnish tank cars.[17]

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[17] U. S. vs. Pa. R. Co., — U. S. —, Nos. 340 and 341, October term, 1916, decided December 11, 1916.

The United States and the Commission insist that they have authority of cases for their two fundamental propositions, to-wit: (1) That it is the duty of the railroad to furnish equipment for the transportation of products; and (2) that the Commission has the jurisdiction to enforce that duty.

The authorities upon the first proposition we are not concerned to review. The duty, as far as this question is concerned, may be admitted—certainly admitted in its general sense. But we need not pause to distinguish its application in the cases to special equipment as distinguished from common equipment, or how much the decisions were based upon the belief of the shipper, justified or encouraged by the railroads, that the equipment required would be furnished.

With the second proposition we are concerned, and a consideration of the cases becomes necessary as they are cases in this court, and are cited to sustain the power of the Commission. They are as follows: Chicago, Rock Island & Pacific Ry. Co. vs. Hardwick Elevator Co., 226 U. S. 426; Ellis vs. Interstate Commerce Commission, 237 U. S. 434; Yazoo, etc., R. R. Co. vs. Greenwood Grocery Co., 227 U. S. 1; St. Louis, etc., Ry. Co. vs. Harris, 234 U. S. 412; Menasha Paper Co. vs. Chicago & N. W. Ry. Co., 241 U. S. 55.

The Hardwick Elevator Case passed upon a law of Minnesota, known as the Minnesota Reciprocal Demurrage Law, which made it the duty of a railroad company on demand from a shipper to furnish

cars for transportation at terminal points within 48 hours and at intermediate points within 72 hours after such demand, Sundays and legal holidays excepted. A penalty was imposed for each day's delay. This court held that by section 1 of the Hepburn Act, Congress had legislated concerning the delivery of cars in interstate commerce by carriers subject to the Act. This was based upon the definitions of section 1 and the provisions of sections 8 and 9. The questions in the case were not those in the present case. The kinds of equipment were not involved, nor the questions dependent upon them. The only question was as to whether Congress had entered the field of regulation.

In Yazoo, etc., R. R. Co. vs. Greenwood Grocery Co., there was also involved a statute which penalized delays in delivering cars. It was held to be within the decision of the Hardwick Elevator Case, as it undoubtedly was.

In the Harris Case, the Carmack Amendment was decided as not excluding a state statute allowing an attorney's fee in certain actions based on claims for small amounts against railway companies. It has no relevancy to the present case.

The Ellis Case grew out of a right asserted by the Interstate Commerce Commission to inquire whether Armour & Co., shipping packing house products in commerce among the states, was controlling the Armour Car Lines and using them as a device to obtain concessions from the published rates for transportation. A series of questions were put to a witness in regard thereto, which he refused to answer, and proceedings to compel his testimony were instituted. A question of the power of the Commission was presented, and that was made to depend upon whether the Armour Car Lines was a common carrier subject to the Interstate Commerce Act. It was replied that the car lines company had no control over the motive power and movement of the cars, and was not a common carrier subject to the Act. And this was said: "It is true that the definition of transportation in section 1 of the Act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth." The language was perfectly opposite to the question under consideration, the relation of the Armour Car Lines to the Armour Company and to the railroad. The cars the latter obtained from the car lines company constituted the equipment of the railroad company and were, of course, subject to the provision of the Interstate Commerce Act.

The question with which the present case is concerned was not presented to the court, not intended to be decided. The testimony sought by the Commission was to expose and prevent what were supposed to be discriminatory practices, and the right to require the testimony depended, it was the effect of the decision, upon the relation of the Armour Car Lines and what was in effect paid to the Armour Company and made a means of discrimination. This view was rejected, and it was said, "It does not matter as to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor"—the lessor or that case being the Armour Car Lines; and, as it was not shown that it was merely the tool of the Armour Company, it had immunity from the

investigation. The case, therefore, is not authority for the proposition which it is urged to support.

Menasha Paper Co. vs. Chicago & N. W. Ry. Co. needs no comment. It quotes but attempts no explanation of the words of the statute that is relevant to our present inquiry. Indeed, in all of the cases the points of inquiry and decision were different from the case at bar. They declared or enforced or recognized the general duty of carriers under the particular facts and the law to which the carriers were subject.

It is next contended by the United States that the railroad has held itself out specifically to carry oil in tank cars, and the fact, it is said, has been found by the Commission and is not reviewable, citing United States vs. Louisville & Nashville R. R. Co., 225 U. S. 314, 320. We are unable to assent.

The railroad company in its answer to the petition before the Interstate Commerce Commission alleged that Rule 29 of the Official Classification No. 39, providing rates for articles in tank cars stated that the carriers whose tariffs were covered by such classification did not assume any obligation to furnish tank cars. There is a concession in the brief of the Interstate Commerce Commission that such was the published tariff, though contesting its efficacy to divest the company of its duty as a carrier. This might be if there was a duty; but the United States seeks to establish the duty from the offer of the company, and must take the offer as made and cannot, nor can the Commission, ignore its explicit qualification that the company assumed no obligation to furnish tank cars. The finding of the Commission, therefore, was one of law and not of fact, and is reviewable.

The railroad company, besides the contentions of want of power in the Commission to make the order under review, object to it (1) in that it is defective because it requires the company to supply cars for movement over the lines of other carriers; and (2) that it is not administrative in character, but is uncertain, indefinite, and unlawful.

In support of the first contention the railroad company points out that the company owns more tank cars than all of the other carriers east of the Mississippi River, amounting at the time of the hearing to 499 cars. The total ownership of other cars east of the Mississippi River amounted to 303, and the privately owned tank cars to 27,700. It therefore appears, it is said, that the railroad ownership is less than 3 per cent of the total ownership, and that of this 3 per cent the company is furnishing more than half. The company, therefore, asserts that if it be compelled to furnish all of the tank cars required for the transportation of oil on its line, irrespective of their destination, it is obvious that a burden out of all proportions is placed upon it. It further complains that although the New York Central Railroad serves the oil companies equally with it, no order is made against that company but, on the contrary, the entire burden is devolved upon it.

In support of the second contention the company asserts that the order of the Commission is not administrative is indicated by decisions of this court in actions for failure to furnish cars. The cases are: Louisville & Nashville R. R. Co. vs. Cook Brewing Co., 223 U. S. 70 (1912); Eastern Ry. Co. vs. Littlefield, 237 U. S. 140 (1915); Penna. R. R. Co. vs. Puritan Coal Mining Co., 237 U. S. 121 (1915);

So, except in cases of unusual emergencies, which cannot reasonably be anticipated by common carrier railroads, it is their duty to have sufficient cars to supply the demands for shipments, both interstate and intrastate, and a failure to furnish under other circumstances will not be excused.[18]

Illinois Central R. R. Co. vs. Mulberry Hill Coal Co., 238 U. S. 275 (1915).

Again, it is charged that the order expressed but a legislative principle, has the generality of such principle without any criterion of application. The order requires the company to "provide * * * upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport complainants' normal shipments in interstate commerce." What is a reasonable request or reasonable notice, and what are normal shipments? The order affords no answer, and if the railroad company ventures, however honestly, any resistance to a request or notice not deemed reasonable, or to shipments not deemed normal, it must exercise this right at the risk of a penalty of $5,000 a day against all of its responsible officers and agents. These considerations are very serious (Harvester Co. vs. Kentucky, 234 U. S. 216; Collins vs. Kentucky, 234 U. S. 634), but the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions.—**U. S. vs. P. R. R. Co., supra.**

(18) R. H. Oliver & Son vs. Chicago, R. I. & P. Ry. Co., 117 S. W. 238, 89 Ark. 466.

CHAPTER V.

DISCRIMINATION AS TO FACILITIES AND RATES.

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DISCRIMINATION AS TO FACILITIES AND RATES.

§ 1. Discrimination as to Facilities.

It is repugnant to the very definition of a common carrier that it should have the right to so discriminate between its customers as to create monopolies or unequal preferences. Its paramount duty is to accept and carry impartially for all who may apply, and it can not perform this duty unless it maintains an impartial relationship with each of those whom it serves.

At common law it is the duty of a common carrier not to make or give any undue or unreasonable preference or advantage to or in favor of any person, and not to subject any person to undue or unreasonable prejudice or disadvantage in respect to terms, facilities, or accommodations. And the carrier is held liable for any damage arising from violation of this duty.[1]

State and federal legislation in the United States has largely superseded the dictates of the common law prohibiting undue or unreasonable discrimination. The com-

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(1) Messenger vs. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; Keeney vs. Grand Trunk R. Co., 59 Barb. (N. Y.) 104, affirmed 47 N. Y. 525; Wheeler vs. San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147; Chicago, etc., R. Co. vs. Wolcott, 141 Ind. 267; Chicago, etc., R. Co. vs. People, 67 Ill. 11, 16 Am. Rep. 599; New England Express Co. vs. Maine Central R. Co., 57 Me. 188, 2 Am. Rep. 31.

It was held in Houston, etc., R. Co. vs. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421, that railroad companies must receive and transport property in the order in which it is offered, and they cannot exercise partiality in accepting the property tendered by some and rejecting that offered by other persons. The court further declared that if the railroad violated this rule, it was liable for any damage arising out of the violation. This is not, however, the view of the law generally applied by the courts.

merce clause of the Constitution of the United States vests in the Congress power to regulate interstate commerce, and in pursuance of that authority the national legislature passed the Act to Regulate Commerce, with numerous amendments and supplementary acts, empowering the Interstate Commerce Commission to administer such laws and supervise the acts and omissions of common carriers engaged in interstate commerce. One of the most important, if not the paramount, office of the Commission is to prevent discrimination in the service, facilities, privileges, and rates of interstate transportation, and since the federal jurisdiction is inclusive of all interstate transportation and most of the states have established commissions for the purpose of regulating and supervising transportation within the state, it is not necessary here to more than briefly consult the common law as it pertains to discrimination.[2]

§ 2. What Amounts to Discrimination.

Mere difference of treatment by the common carrier of its customers does not necessarily amount to an unlawful discrimination. What amounts to discrimination must depend upon the surrounding circumstances. Thus, it was held in Audendried vs. Philadelphia, etc., R. Co., 68 Pa. St. 370, 8 Am. Rep. 195, that "among other things, the convenience of the company is to be considered. Where, owing to an increase of business, the railway company was obliged to separate its mineral from its goods traffic at its station at O., and to handle its mineral traffic at another station, but still continued to deliver coal at O. to

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(2) Palmer vs. London, etc., R. Co., L. R., 1 C. P. 588, 35 L. J. C. P. 289; same, L. R., 6 C. P. 194, 40 L. J. C. P. 133; Garton vs. Bristol, etc., R. Co., 1 B. & S. 112, 101 E. C. L. 112, 30 L. J. Q. B. 273, 6 B. N. S. 639, 95 E. C. L. 639, 28 L. J. C. P. 306.

a large gas works near the station, which had side tracks, so that coal consigned to it could be removed at once, * * * this did not constitute an undue preference."

The common law does not require the same rates and facilities for all. Every shipper need not be charged exactly the same rates or furnished the same facilities. The degree of difference in treatment of shippers in order to amount to that discrimination or preference which the law prohibits, must be such as to create undue advantage or preference or disadvantage or prejudice in favor of or against one shipper as compared with another or other shippers similarly situated. Thus, the distinctions which may be drawn by a common carrier in its treatment of its customers without violating the common law rule against discrimination will be generally observed in the subsequent sections.

§ 3. In Acceptance.

If a common carrier receives the goods of certain shippers after closing hours of its offices and freight depots, at the same time refusing to accept the goods of others, the circumstances remaining the same, is an act of discrimination prohibited at common law.[3] For such a distinction in the receipt of goods from its customers to be consonant with the common law rule, some unusual reason would have had to exist as to the shippers thus refused to justify the discrimination.

The state statutes follow the English Act providing that no common carrier shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company or any particular description of traffic in any respect whatsoever, and forbid

(3) Garton vs. Bristol, etc., R. Co., 1 B. & S. 112, 101 E. C. L. 112, 30 L. J. Q. B. 273.

discrimination as to the time of receiving goods or in admitting vans of certain shippers at later hours than others.[4] But this subject-matter is comprehensively regulated by the Act to Regulate Commerce as to interstate transportation.[5]

§ 4. In Conditions of Bill of Lading.

It is an undue discrimination at common law to require the consignor to accept conditions affixed to a bill of lading which he is required to sign and not require other consignors of the same class to sign and accept.[6]

See also "Bills of Lading," this volume, post.

§ 5. As to Time of Shipment.

It is an undue discrimination at common law to require difference in forwarding time of shipments as between shippers of the same class. In **Great Western, etc., R. Co.** vs. **Burns,** 60 Ill. 284, 12 Am. Ry. Rep. 309, it was held that where a railroad company stores freight received for transportation, because it has no present facilities for forwarding it, but during the period of storage receives and forwards new and subsequent freight, it is liable to the shipper damaged thereby.

Where blockades of freight necessitate delay in the forwarding of shipments already received, the goods should be forwarded in the order of time in which they were received by the carrier for transportation.[7] If the carrier

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(4) Id.

(5) See "Interstate Commerce Law," subj. "Discrimination," ante.

(6) Baxendale vs. Bristol, etc., R. Co., 11 C. B. N. S. 787, 103 E. C. L. 787; South Eastern R. Co. vs. Ry. Comrs., 41 L. T. N. S. 760, 28 W. R. 464.

(7) Houston, etc., R. Co. vs. Smith, 63 Tex. 322; Atcheson vs. New York Cent. R. Co., 61 N. Y. 652; Page vs. Great Northern R. Co., 2 Ir. Rep. (C. L.) 288.

exercises partiality in such cases by refusing to accept the goods of some shippers on the ground of the blockade, but at the same time receives goods tendered by others, it is liable for damages to the shipper injured by such refusal.[8]

This rule does not mean, however, that, where necessary, a common carrier may not dispense with its requirement temporarily and forward relief shipments for sufferers from flood, fire, or other catastrophe.[9] In the case of perishable goods, the carrier is under the duty of giving them preference in movement because of the dangers of delay due to the inherent character of the goods.

§ 6. In Freight Charges.

The common law rule against discrimination requires that common carriers may not arbitrarily discriminate among their shippers to the advantage of one and the disadvantage of another. This long standing precept in the law does not mean that every shipper shall be charged exactly the same rates. The rule is against that discrimination which is undue or unreasonable. There are, obviously, classes of shippers the character of whose goods justifies distinctions by a common carrier in both charges and facilities. The English courts[10] apply the rule more strictly than our own.[11] The rule was well stated in

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(8) Id. (63 Tex. 322).

(9) M. C. R. Co. vs. Burrows, 33 Mich. 6.

(10) West vs. London, etc., R. Co., L. R., 5 C. P. 622; Cooper vs. London, etc., R. Co., 4 C. B. N. S. 738, 93 E. C. L. 738; Lee vs. Lancashire, etc., R. Co., 18 Sol. Jour. 629.

(11) Lough vs. Outerbridge, 143 N. Y. 271, 42 Am. St. Rep. 712; Butchers', etc., Stock Yards Co. vs. Louisville, etc., R. Co., 67 Fed. Rep. 35, 31 U. S. App. 252; Canada Southern R. Co. vs. International Bridge Co., L. R. 8 App. 723; Menacho vs. Ward, 23 Blatchf. (U. S.) 505; Johnson vs. Pensacola, etc., R. Co., 16 Fla. 623, 26 Am Rep. 731; Fitchburg R. Co. vs. Gage, 12 Gray (Mass.) 393; Concord, etc., R. Co. vs. Forsaith, 59 N. H. 122, 47 Am. Rep. 181; State vs Cincinnati, etc., R. Co., 47 Ohio St. 130, 42 Am. & Eng. R. Cas. 330; Avinger vs. South

Fitchburg R. Co. vs. Gage, 12 Gray (Mass.) 399, where the court said:

> "The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation and no more. If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief."

A railroad company can not be charged with unjust discrimination because it carries freight free for one of its eating houses, and furnishes it with fuel and ice and also gives its proprietor transportation, and refuses the same favors to another house on its line, no similarity in the contractual relations of the respective proprietors being shown.[12]

The common law rule as to freight charges, is best stated to the effect that a common carrier is not bound to treat all his patrons with absolute equality. He must carry for each shipper at a reasonable rate. If one shipper's rate is reasonable, he should not be heard to complain if the carrier favors others with less than reasonable rates,[13] provided no undue discrimination results from the

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Carolina R. Co., 29 S. Car. 265, 13 Am. St. Rep 716, 35 Am. & Eng. R. Cas. 519; Ragen vs. Aitken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684, 9 Am. & Eng. R. Cas. 201.

(12) Kelly vs. Chicago, etc., R. Co. (Iowa 1895), 61 N. W. Rep. 957.

(13) See note 11, Id.

difference in rates. There are circumstances in transportation which warrant the charging of lesser rates for a particular shipper or class of shippers who, for instance, offer their goods in larger quantities or under conditions enabling the carrier to transport them at less expense.[14]

A common carrier may require prepayment from any shipper at its choice, though it may not require it from others.[15] In **Allen** vs. **Cape Fear, etc., R. Co.,** 100 N. Car. 397, 35 Am. & Eng. R. Cas. 532, it was said that demanding prepayment is but the exercise of a right to demand of everyone that the charges upon all freight to be conveyed shall be paid in advance. The court said: "We do not perceive any legal wrong done to one to whom credit may not be given because it is given to others; it may be because of their punctuality in paying bills whenever they are presented. The statute recognizes the right, for it compels the company to furnish transportation, not generally, but on due payment of the freight or fare legally authorized therefor. * * * And therefore the exaction of prepayment of freight for goods consigned to the plaintiff is but the assertion of a right which might be, if in fact it be not, enforced against all dealers."

What constitutes a valid and justifying reason for discrimination between shippers depends upon the circumstances of each case. Competition, more than any other one factor, causes common carriers to differentiate in their rates. It is but obeying a primal law of business for the carrier to afford a lower rate to a shipper whose

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(14) Johnson vs. Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731; Fitchburg R. Co. vs. Tuder, 12 Gray (Mass.) 399; Branley vs. South Eastern R. Co., 12 C. D. N. S. 74, 104 E. C. L. 74; Baxendale vs. Eastern Counties R. Co., 4 C. D. S. 78, 93 E. C. L. 78; Wood on Railroads (Miners' Ed.), secs. 197 and 198.

(15) Randall vs. Richmond, etc., R. Co., 108 N. Car. 612, 49 Am. & Eng. R. Cas. 75.

traffic must be secured in competition with other carriers, either rail or water, than is offered to another shipper whose business may be obtained without such competition. This was the holding in **Ragen** vs. **Aitken, supra,** where the defendant carrier offered a lower rate to shippers located at some distance from the terminus of its line than it afforded to the plaintiff who was located on its line, the charges assessed the plaintiff not being unreasonable **per se.** "If the charge on the goods of the party complaining is reasonable and such as the company would be required to adhere to as to all persons in like conditions, it may nevertheless lower the charge to another person if it be to the advantage of the company and not inconsistent with the public interest, and based on a sufficient reason," said the court, since it was not the purpose of the carrier in this case to discriminate against the plaintiff as compared with other shippers at the same point, but to procure traffic which was possible to be had through the inducement offered by lower rates at a distance from its terminal, and which unless attracted to the defendant carrier's line would take another and competitive route to its destination.

It has long been the attitude of the common law that a common carrier had a property right in its rates and charges under the provisions of the Constitution of the United States and of which it could not be invested without due process of law. So, any rate which was required to be charged by the carrier and which was less than remunerative was confiscatory of its property. Thus, it has always been held that neither a state legislature, nor its offspring, an administrative commission, may prescribe rates so unreasonably low as to amount to confiscation of the carrier's property. The powers exercised by a railroad or public utilities commission in the supervision

and prescription of rates are both legislative and administrative and the courts are without authority to revise or change rates which are imposed by a legislature or commission. But it was held in Reagen vs. Farmers' Loan & Trust Company, 154 U. S. 362, that the courts have power, and it is their duty, to inquire whether rates prescribed by legislative or commission authority are so unjust and unreasonable as to amount to confiscation of the carrier's property.

Our state and federal regulating systems have been clothed with such authority over the reasonableness and discriminatory nature of rates that the courts have little more to do now than to inquire whether the commission has, in the administration of its powers, exceeded the authority vested in it. And we may no longer rely on the judicial constructions given to the common law when that law was the practical law of the land pertaining to common carriers and their service of transportation.

Thus, in the Yellow Pine Cases,[16] where a vast enlargement of lumber traffic had resulted in a large increase of net revenue to the carrier, and the service was inexpensive, and required neither rapidity of movement nor specially equipped cars, and the shippers were obliged to furnish and pay for the equipment, and the railroads were neither required to load nor unload, and the commodity was neither fragile nor perishable, and the industry afforded a tonnage second in magnitude to any transported by the carrier, it was held that an arbitrary increase in rates to points of destination of 2 cents a hundred pounds was unreasonable and unlawful. This case illustrates the power of the courts to inquire whether a body of rates is so unjust as to amount to destruction of the rights of the

[16] Tift vs. Southern R. Co., 138 Fed. 753; affirmed Southern R. Co. vs. Tift, 206 U. S 428, 51 L. Ed. 1124, 27 S. Ct. 709.

shipper. In this same case, it was held that reasonable compensation for the service actually rendered is all that a common carrier is permitted to exact, and that railroads have no right to regulate their charges in proportion to the prosperity which attends industries whose products they transport. The general rule is that the greater the tonnage to be transported the lower should be the rate of freight charges therefor.[17] It is also obvious that if discrimination is to be avoided, a common carrier being required to give his service at reasonable rates, it is as much a matter of public policy that established rates be not unreasonably low as that they be not unreasonably high.[18]

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(17) Id.

(18) Sandusky-Portland Cement Co. vs. Baltimore & Ohio R. Co., 187 Fed. Rep. 583.

CHAPTER VI.

DELIVERY TO CARRIER.

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§ 1. General.

Since the extraordinary liability of the common carrier as an insurer of the goods in its custody for transportation commences upon delivery of the freight to it for transportation, two phases of the delivery to the carrier are presented for consideration, viz.: whether there has been delivery in fact and what evidence exists of such delivery. The place where the carrier holds itself out to receive goods, the time of their delivery to the carrier, the authority of the carrier's agent to receive them, and the acts of both the shipper and the carrier in consummating complete delivery to the carrier, are factors affecting the attachment of the common carrier's responsibility and the extent to which its liability permits recovery for loss or damage.

§ 2. Delivery Must Be for Immediate Transportation.

If the delivery of the goods to the carrier is subject to storage for a particular period or until some further step is had in the preparation of the goods for transportation or to await shipping instructions from the consignor, or until some other happening, the liability of the common carrier is merely that of a warehouseman until the transportation actually begins. So, the delivery to the carrier must be for immediate transportation in order for the full responsibility of the carrier as an insurer to begin with the delivery.[1] In the other cases enumerated the liability

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(1) O'Neill vs. Railroad Co., 60 N. Y. 138; Basnight vs. Railroad Co., 112 N. Car. 592, 16 S. E. Rep. 323; Mt. Vernon Co. vs. Railroad

of the carrier commences as soon as the conditions are fulfilled or the consignor's instructions given.[2]

§ 3. By Shipper's Agent.

The consignor may constitute some person his lawful agent to deliver his goods for transportation by a carrier, and to effect the purpose of his agency may exercise all the powers necessary to effect a delivery to the carrier, the acts of such agent being binding upon his principal. Thus, the agent, in the absence of a known limitation upon his authority, may give shipping instructions and accept the terms and conditions of transportation on behalf of the consignor or shipper.[3]

§ 4. Carrier's Agent Authorized to Accept.

In the conduct of the business of transportation by railroad, it is the custom for the carrier to place a person in charge of its business at a certain point, making such person his agent to receive and deliver goods and his acceptance of a shipment is binding upon the carrier. And the carrier may not repudiate the acts of such agent.[4]

Co., 29 Ala. 296, 8 So. Rep. 687; Barron vs. Eldredge, 100 Mass. 455; Dixon vs. Railway Co., 110 Ga. 173, 35 S. E. Rep. 369; Schmidt vs. Railway Co., 90 Wis. 504, 63 N. W. Rep. 1057; Railway Co. vs. Riggs, 10 Kan. App. 578, 62 Pac. Rep. 712; Railway Co. vs. Bank, 112 Fed. 861, 50 C. C. A. 558, 56 L. R. A. 546.

(2) Railway Co. vs. Murphy, 60 Ark. 333, 30 S. W. Rep. 419, 46 Am. St. Rep. 202; M. C. R. Co. vs. Shurtz, 7 Mich. 515.

(3) Fitch vs. Newberry, 1 Doug. 1, 40 Am. Dec. 33; Drake vs. Nashville, C. & St. L. R. Co., 148 S. W. 214; Mechem on Agency, sec. 311.

(4) Woumit vs. Henshaw, 35 Vt. 605, holding that where a passenger upon a railroad train is justified in regarding the man whom he sees handling the baggage as the agent of the company and giving him directions as to the disposition to be made of his baggage, a delivery to a person apparently employed in a freight office to receive and receipt for the goods in the presence of and with the knowledge of the agent, who does not object, a good delivery to the carrier, was consummated. Harrell vs. Railroad, 106 N. Car. 258.

But if delivery of a shipment is made to an employe of the carrier whose employment is such "as to negative a reasonable belief" that he has authority to accept goods for transportation, the acceptance of a shipment by such employe is not sufficient to constitute a delivery to the carrier.[5]

§ 5. Carrier's Duty to Receive Goods in General.

A common carrier is bound to receive all goods offered that he is able and accustomed to carry, and to transport such goods and deliver them pursuant to the contract of carriage.[6]

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(5) Trowbridge vs. Chapin, 23 Conn. 595; Ford vs. Mitchell, 21 Ind. 54; Louisville & N. R. Co. vs. Mink, 103 S. W. 294, 31 Ky. Law Rep. 833; Murray vs. Postal Telegraph & Cable Co., 96 N. E. 316, 210 Mass. 188; Missouri Coal & Oil Co. vs. Hannibal & St. Joseph R. Co., 35 Mo. 84; Milne vs. Chicago, R. I. & P. Ry., 175 S. W. 85; Bean vs. Studevent, 8 N. H. 146, 28 Am. Dec. 389; Mayall vs. Boston & Maine R. Co., 19 N. H. 122, 49 Am. Dec. 149; Blanchard vs. Isaacs, 3 Barb. 388; Thurman vs. Wells, 18 Barb. 500; Witbeck vs. Schuyler, 44 Barb. 469, 31 How. Prac. 97; Cronkite vs. Wells, 32 N. Y. 247; Rogers vs. Long Island R. Co., 38 How. Prac. 289; Rogers vs. Wheeler, 52 N. Y. 262, affirming 6 Lans. 420; McClure vs. Richardson, 1 Rice 15, 33 Am. Dec. 105; Jenkins vs. Picket, 17 Tenn. (9 Yerg.) 480; Landon vs. Proctor, 39 Vt. 78.

The mere fact that goods were delivered to the deck hands of a steamboat is not sufficient to charge the owners as common carriers, unless it be shown that such persons were authorized to receive freight, or that the same was delivered to them in pursuance of some special contract or usage; and, in a given case, otherwise fully established, it will not be sufficient, to remove the necessity for such proof, for the court or jury to find for the manner of reception of the freight by the deck hands was such that the officers whose duty it was to receive goods for transportation must, if they had exercised reasonable care, have known that the freight was in the boat, and have received it.—Ford vs. Mitchell, 21 Ind. 54.

In Milne vs. Chicago, R. I. & P. Ry. Co., 135 S. W. 85, it was held that where a carrier places one in a depot and holds him out to the public as qualified to receive shipments, a delivery to and acceptance by him is a delivery to the carrier.

(6) Olanta Coal Mining Co. vs. Beech Creek R. Co., 144 Fed. Rep. 150, affirmed in 158 Fed. Rep. 36; Platt vs. Lecoq, 158 Fed. Rep. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558; Bluthenthal vs. Southern R. Co., 84 Fed. Rep. 920; Inman & Co. vs. Seaboard Airline Ry. Co., 159 Fed. Rep. 960; Atlantic Coast R. Co. vs. Rice, 52 So. Rep. 918; Purcell

While a common carrier is in general bound to transport all goods that are properly offered for that purpose, it has power to make reasonable regulations governing the manner and place in which to receive such articles as it professes to carry, and also to change or modify such regulations on reasonable notice to the public. In the absence of statutory interposition and regulation, a carrier may establish and promulgate reasonable rules and regulations governing the manner and form in which it will receive such articles of commerce which it is bound to carry, as well as the manner in which they shall be packed and prepared for shipment, and may alter or modify such rules from time to time on reasonable notice to the public.[6a]

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vs. Southern Express Co., 34 Ga. 315; Southern Express Co. vs. R. M. Rose Co., 53 S. E. 185, 124 Ga. 581, 5 L. R. A. (N. S.) 619; Shellnut vs. Central of Georgia Ry. Co., 62 S. E. 294, 131 Ga. 404, 18 L. R. A. (N. S.) 494; McIntosh vs. Oregon Railroad & Navigation Co., 105 Pac. 666, 17 Idaho 100; People vs. Chicago & A. R. Co., 55 Ill. 95, 8 Am. Rep. 631; Chicago & Northwestern Ry. Co. vs. People, 56 Ill. 365, 8 Am. Rep. 690; Louisville, N. A. & C. R. Co. vs. Keefer, 44 N. E. 796, 146 Ind. 21, 38 L. R. A. 93, 58 Am. St. Rep. 348; Eastern Kentucky R. Co. vs. Holbrook, 4 Ky. Law Rep. 730; Crescent Coal Co. vs. Louisville & N. R. Co., 135 S. W. 768, 143 Ky. 73; Louisville & N. R. Co. vs. Higdon, 148 S. W. 26, 149 Ky. 321; McMillan vs. Michigan D. & N. I. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Heffron vs. Michigan, S. & N. I. R. Co., 16 Mich. 131; King vs. Michigan, S. & N. I. R. Co., 16 Mich. 132; Coup vs. Wabash, St. L. & P. Ry. Co., 22 N. W. 215, 56 Mich. 111, 56 Am. Rep. 374; Delaware, L. & W. R. Co. vs. Central Stock Yards & Transit Co., 43 N. J. Eq. 605, 12 Atl. 374; Reid vs. Southern Ry. Co., 69 C. E. 618, 153 N. Car. 490; Missouri Pacific Ry. Co. vs. Harris, 1 White & W. Civ. Cas. Ct. App., sec. 1263.

[6a] Harp vs. Choctaw, O. & G. R. Co., 125 Fed. Rep. 445, 61 C. C. A. 405, affirming 118 Fed. Rep. 169; Robinson vs. Baltimore & O. R. Co., 129 Fed. Rep. 753, 64 C. C. A. 281; United States vs. Oregon R. & Nav. Co., 159 Fed. Rep. 975; Kuter vs. Michigan Central R. Co., Fed. Cas. 7955 (1 Biss. 35); Bedford-Bowling Green Stone Co. vs. Oman, 134 Fed. Rep. 441, affirmed in 134 Fed. Rep. 64, 67 C. C. A. 190; Platt vs. LeCoq, 158 Fed. Rep. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558; Danciger vs. Wells Fargo Co., 154 Fed. Rep. 379; Danciger vs. Pacific Express Co., 154 Fed. Rep. 379; Atlantic Coast Line R. Co. vs. Rice, 50 So. Rep. 918; Pfister vs. Central Pacific R. Co., 70 Cal. 169, 11 Pac. Rep. 686, 59 Am. Rep. 404; Southern Express Co. vs. R. M. Rose Co., 53 S. E. 185, 124 Ga. 581, 5 L. R. A. (N. S.) 619;

§ 6. Place of Delivery.

A common carrier has the right to make reasonable regulations governing the acceptance of freight for transportation, such as the manner and place in which it will receive such articles as it professes to carry, and also to change or modify such regulations on reasonable notice to the public.[7] Thus, it may fix the times, the places, the methods, and the forms in which it will receive commodities it offers to transport.[8]

At common law it is not necessary, in all cases, to make delivery to the carrier at the place appointed by him, or at his office or place of business, provided the delivery be made to a person who is authorized to receive the goods. But this rule relates largely to other kinds of common carriers than railroads.[9]

Coweta Co. vs. Central Georgia R. Co., 60 S. E. 1018, 4 Ga. App. 94; Central of Georgia R. Co. vs. Cook & Lockett, 62 S. E. 464, 4 Ga. App. 698; Illinois Central R. Co. vs. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Phelps vs. Illinois Central R. Co., 94 Ill. 548; Elgin, J. & E. Ry. Co. vs. Bates Mach. Co., 98 Ill. App. 311, affirmed 66 N. E. 326, 200 Ill. 636, 93 Am. St. Rep. 218; Pittsburgh, C., C. & St. L. Ry. Co. vs. Morton, 61 Ind. 539, 28 Am. Rep. 682; Cleveland, C., C. & St. L. Ry. Co. vs. Henry, 83 N. E. 710; O'Rourke vs. Chicago, P. & Q. Ry. Co., 44 Iowa 526; Chesapeake & O. Ry. Co. vs. Hall, 124 S. W. Rep. 372; Louisville & N. R. Co. vs. Higdon, 148 S. W. Rep. 26, 149 Ky. 321; Bullard vs. American Express Co., 110 Mich. 695, 65 N. W. 551; Yazoo & M. V. R. Co. vs. Searles, 37 So. Rep. 939, 85 Miss. 520, 68 L. R. A. 715; Guld Compress Co. vs. Alabama Great Southern R. Co., 56 So. Rep. 666; Chouteau vs. St. Anthony, 11 Mo. 226; Gray vs. Wabash R. Co., 95 S. W. Rep. 983, 119 Mo. App. 144; Chicago, R. I. & P. R. Co. vs. Colby, 96 N. W. Rep. 145, 69 Neb. 572; Pietrich vs. Fargo, 102 N. Y. Supp. 720, 52 Misc. Rep. 200; State vs. Goss, 59 Vt. 256, 9 Atl. 829, 59 Am. Rep. 706.

In Reid & Beam vs. Southern Ry. Co., 63 S. E. Rep. 112, 149 N. C. 423, it was held, where the point to which freight was to be consigned was not a regular station, at which an agent of the carrier was kept, was no valid excuse for the carrier's refusal to receive the freight for transportation.

(7) Id.

(8) Id.

(9) Merriam vs. The Railroad, 20 Conn. 354; Converse vs. Transportation Co., 33 Conn. 166; Washburn-Crosby Co. vs. Railroad Co.,

§ 7. Effect of Notice to Carrier's Agent.

In order to constitute delivery to a carrier, complete control of the goods must be given to him.[10] Notice to the carrier or its agent of the delivery of goods at the depot of the carrier is ordinarily necessary to constitute such delivery to the carrier that his common law liability shall at once commence. Custom and usage, however, may make actual notification of the carrier or his agent unnecessary.[11]

There is no delivery and acceptance so as to create the relation of shipper and carrier so long as the owner retains the control of the goods. Ordinarily it is necessary in delivering goods to railroads that they be delivered at a station and to an authorized agent of the carrier; but this rule may be changed by custom or usage of the company, or by agreement between the parties, as to

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180 Mass. 252, 62 N. E. Rep. 590; Truax vs. Railroad Co., 3 Houst. 233, 251; Philipps vs. Earle, 8 Pick. 182; Blanchard vs. Isaacs, 3 Barb. 388; Cronkite vs. Wells, 32 N. Y. 247; Southern Express Co. vs. Newby, 36 Ga. 635. See Whitbeck vs. Schuyler, 44 Barb. 469, where delivery of a trunk to the captain of a steamboat was held sufficient, although the company to which the boat belonged had an agent in the same place, whose business it was to make contracts for freight, and although it was shown that the captain was only to navigate the boat, it not appearing that the shipper had knowledge of such an arrangement, where it was held that the principal should be held responsible for the act of his agent performed within the scope of the apparent authority which the principal allows him to assume. Compare this holding with Missouri Coal Co. vs. The Hannival, etc., R. R. Co., 35 Mo. 84, where it was held that the agency must be distinctly proven. Grosvenor vs. N. Y. C. R. R. Co., 39 N. Y. 34.

Merely placing goods in a position where the carrier might easily have taken them in charge is not sufficient to charge him with the responsibility for their safety, if he did not know that it was intended that he should receive and ship them. **O'Banon** vs. **Southern Express Co.**, 51 Ala. 481; **Houston, etc., R. Co.** vs. **Hodde**, 42 Tex. 467. But if such deposit was made in pursuance of an agreement with the carrier, then he will be charged with knowledge sufficient to constitute delivery. **Bowie** vs. **Baltimore, etc., R. Co.**, 1 McArthur (D. C.) 94.

[10] Gulf, C. & S. F. Ry. Co. vs. Lowery, 155 S. W. 992.

[11] Green vs. M. & St. P. Ry. Co., 38 Iowa 100.

either the place or mode of delivery. This was the holding in **Truax** vs. **Philadelphia, etc., R. Co.,** 3 Houst. (Del.) 233.

But merely placing goods in a position where the carrier might easily have taken them in charge is not sufficient to charge him with responsibility for their safety, if he did not know that it was intended that he should receive and ship them. **O'Bannon** vs. **Southern Express Co.,** 51 Ala. 481; **Houston, etc., R. Co.** vs. **Hodde,** 42 Tex. 465. But if such deposit was in pursuance of an agreement with the carrier, the carrier would then be charged with sufficient knowledge to constitute delivery. **Bowie** vs. **Baltimore, etc., R. Co.,** 1 McArthur (D. C.) 94.

§ 8. Constructive Delivery.

A constructive delivery of goods to a carrier can only take place where, by constant practice and usage of the carrier, he receives property for transportation at a particular place.[12]

It is the general rule that delivery, in order to bind the carrier, must be made either to him or to some authorized agent, or to some person who may be rightfully presumed to have such authority, but the carrier and his customer may, by conventional arrangement, vary the rule or by custom and usage so change the mode of delivery to the carrier as to legally depart from the rule. The rule may be varied by stipulation, which becomes binding upon the carrier and supersedes the general law.[13] Thus, "proof

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(12) Witzler vs. Collins, 70 Me. 290, 35 Am. Rep. 327.

In Stewart vs. Gracy, 93 Tenn. 314, 27 S. W. 664, it was held that the mere delivery of warehouse receipts, with order for delivery of the goods, to a common carrier, is not a constructive delivery of the goods, so as to render it liable in case the goods are burned in the warehouse before it can remove the same, though it enters the receipts on its books, and has commenced to remove the goods.

(13) Hutchinson Carriers, 3d ed., Vol. I, chap. IV, sec. 115, pp. 111 and 112, and cases cited in footnote 33.

of a constant habitual process and usage of the carrier to receive the goods when they are deposited for him in a particular place without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered as delivered to him, without any further notice."[14]

§ 9. When Delivery Complete.

The effect of delivery as initiating the carrier's liability not infrequently involves the question of when delivery to the carrier becomes completed. The rule is best stated that delivery becomes completed when entire exclusive custody of the goods has been given to the carrier. Technically, the liability of the carrier arises **eo instanti** ("on the instant") with his acceptance of the goods tendered to him. The question which may arise as to the acceptance by the carrier or the completion of the delivery to him is one of fact rather than of law. Hutchinson states the rule as follows: "To effect a delivery to the carrier there must be, either actually or in legal effect, a complete surrender to him of possession and custody, and, as a consequence, all control of the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and until this has been done it cannot be said that the carrier has assumed any responsibility for them as a carrier."[15]

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(14) Id.

(15) Hutchinson Carriers, 3d ed., Vol. I, chap. IV, sec. 119, p. 116, and cases cited in footnote 1.

In East, etc., Ry. Co. vs. Hall, 64 Tex. 615, it was held that delivery is complete when the goods are accepted for carriage, and though the statute provides that transportation shall be deemed to have commenced when bill of lading is signed, the carrier may become liable before the goods had been actually delivered and accepted by him.

Where the shipper of goods has done all he intends to do to them before they are shipped, and has notified the carrier's agent that they are upon the platform and ready for shipment, and the agent agrees to forward them, there is a sufficient delivery to make the company liable as a common carrier; citing Stapleton vs. Railway Co., 133 Mich. 739, 10 Det. L. N. 133, 94 N. W. Rep. 739; Railway Co. vs. Murphy, 60 Ark. 333, 30 S. W. Rep. 419, 46 Am. St. Rep. 202.

"The long-established and familiar rule (Thomas vs. Day, 4 Esp. 262) as to the warehouseman, that his liability commences as soon as the goods arrive at his warehouse and the crane of the warehouse has been applied to them to raise them into the warehouse, has been applied to the common carrier under similar circumstances, and the delivery to him and his acceptance of the goods held to commence from the moment he or his servants undertake to load them from the conveyance of another carrier upon his own and for that purpose have attached his tackle to them. And where an engine was sent by a truckman to the depot of a railroad company for shipment, the delivery to the road was held to be complete and its liability to have commenced as soon as the work of transferring the engine from the truck to the company's car had been commenced by means of a derrick, the agent of the company being present, superintending and directing the work, and the case was said to be the same in principle as that of the warehouseman. As soon, therefore, as the work of transferring the engine was commenced under the superintendence of the road, the liability of the truckman as carrier ceased and that of the company commenced. (Merritt vs. The Railroad, 11 Allen 80.)

"When the owner of the goods has done all in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further the shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them **in transitu**, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him. The mere fact, therefore, that the owner of the goods has loaded them on a car, even though the carrier by the owner's directions has placed the car in a position convenient for such purpose, will not of itself be sufficient to constitute a delivery. Before the delivery will be deemed complete the owner must not only have relinquished his control over the car, but notice that it was ready for shipment must have been given the carrier. Thus where it was the course of business for a railroad company, when required to do so, to send its cars upon a side track at the place of shipment to receive cotton for transportation, and for the shipper there to load upon them the freight, make out a manifest and leave it with the agent of the company, who then had the bales counted, signed bills of lading, and sent locomotives to remove the cars thus loaded and place them in the train destined to the point to which the shipments were to be made, it was held that the delivery was complete as soon as the cotton was put upon the company's cars in this manner by the shipper and the company's agent informed of the fact. (Ill. Cent. R. R. vs. Smyser, 38 Ill. 354.) And where the owner of lumber ordered a car in which to load lumber for the purpose of shipment, and the carrier, in pursuance of such order, placed a car on one of its side tracks for such purpose, and after the car was loaded, but before the carrier had been notified that it was ready for shipment, or had been apprised of the name of the consignee, it caught fire and the lumber was destroyed, it was

The delivery to the carrier must be so completed that the exclusive custody of the goods has actually passed to the carrier and the final shipping instructions, prerequisite to the beginning of transportation, given, so that the carrier is free to immediately begin the performance of its duty and place the goods at once in transportation, to the end that its extraordinary liability of insurer may be brought to an end as speedily as possible by the completion of its contract of carriage.

§ 10. Effect of Bill of Lading on Completion of Delivery.

It has long been the rule at common law that a bill of lading is evidence of a shipment as between the carrier

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held that as the carrier had not been notified that the car was ready for shipment, nor the name of the consignee given him, there was not such a delivery of the goods as to render him liable as a common carrier. (Basnight vs. Railroad Co., 111 N. Car. 592, 16 S. E. Rep. 323; Yoakum vs. Dryden [Tex. Civ. App.], 26 S. W. Rep. 312.) And in another case, it appeared that on account of there being no station agent located at the place of shipment, it was the custom between plaintiff, a shipper of cotton, and the defendant carrier, for the plaintiff when he wished to make a shipment to notify the conductor of a local freight train to leave a car thus placed, would load it, and when the same was ready for shipment, he would flag the train to which he desired the car to be attached and the conductor of the flagged train would give him a bill of lading. In accordance with this custom, a car was placed upon the adjoining track which the plaintiff loaded with cotton. Shortly after the car was loaded, but before the passing of the next train, the car and its contents were destroyed by fire. It was held that while the car and the track upon which it was standing belonged to the defendant, yet not having been notified that the car was loaded and ready for shipment, there was no delivery and acceptance shown such as to render him responsible as a common carrier for the loss. (Tate vs. Railroad Co., 78 Miss. 842, 29 So. Rep. 392, 84 Am. St. Rep. 649.) But where the owner of the goods has placed them in the car, and has given notice to the carrier that they are ready for shipment, or where, according to the course of dealing between himself and the carrier, he has done all that is required of him, of which fact the carrier has notice, so that whatever remains to be done is exclusively the work of the carrier, the delivery will be deemed complete, and the liability of the common carrier as such will at once commence (Railway Co. vs. Murphy, 60 Ark. 333, 30 S. W. Rep. 419, 46 Am. St. Rep. 202);" Hutchinson Carriers, 3d ed., Vol. I, chap. IV, secs. 124 and 125, and cases cited in footnotes 20 to 25, both incl.

and the shipper.[16] But this is a statement of a generality of law.

Delivery of a bill of lading is not necessary to make a carrier liable for such goods as are actually delivered to it for transportation.[17]

It is the requirement of the present federal regulation and of most of the states that a common carrier shall issue and deliver to one tendering goods for shipment of the class and kind which the carrier professes to carry, a bill of lading or receipt in approved form in consummation of its acceptance of the goods,[18] but at common law no receipt, bill of lading, or writing of any kind is required to subject the carrier to the liability of an insurer of the goods.[19]

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(16) Flower vs. Downs, 12 Rob. (La.) 101.

Cape Heart vs. Granite Mills, 97 Ala. 353, 1207 So. 44, was an action against a transportation company for failure to deliver certain cotton. It appeared that the bill of lading was issued by one who was engaged in the transfer business and was accustomed to transfer cotton to the river landings for shipment by defendant's boats; that he was authorized by defendant to issue bills of lading for it, but that there was an express agreement that the defendant should not be responsible for the cotton until it was actually delivered at the river, which agreement was known to the shippers. There was no proof of actual delivery of the cotton to defendant, except the identification of the bill of lading by the transfer man and there was evidence to the contrary. The court held that an instruction that the issuance by the transfer man under defendant's authority of the bill of lading was **prima facie** evidence of delivery to defendant, was erroneous.

(17) Berry vs. Southern Ry. Co., 30 S. E. 14, 122 N. C. 1002.

In Gulf, C. & S. F. Ry. Co., Compton (Tex. Civ. App.), 38 S. W. 220, it was held that the relation of carrier was assumed by defendant, though the bill of lading was not yet issued, where plaintiff had delivered a wagon to defendant's road for shipment after 5 o'clock p. m., the shipping clerk having left, but the wagon was received, and plaintiff was informed that the bill of lading would be made out the next day.

(18) Act to Regulate Commerce as amended, sec. 20.

(19) Texas Pacific Ry. Co. vs. Nicholson, 61 Tex. 491; Railway Co. vs. Webb, 103 Ky. 705, 46 S. W. Rep. 11; D. David, 5 Blatch. 266; Hannibal, etc., R. R. vs. Swift, 12 Wall. 262; Pickford vs. The Railway, 12 M. & W. 766; Porcher vs. The Railroad, 14 Rich. (Law) 181; Railroad Co. vs. Keith, 8 Ind. App. 57, 35 N. E. Rep. 296; Railroad

This is the rule because the carrier's duty arises in law in the exercise of its quasi-public functions and not in a contractual relationship with the shipper.

Co. vs. Allgood, 113 Ala. 163, 27 So. Rep. 986; Express Co. vs. U. S. Express Co., 88 Fed. Rep. 659; Evans vs. The Railroad Co., 90 S. W. Rep. 588; Meloche vs. Railway Co., 1002, 30 S. E. Rep. 14; Martin vs. Railway Co., 3 Tex. Civ. App. 556, 22 S. W. Rep. 1007; Railway Co. vs. Beard (Tex. Civ. App.), 78 S. W. Rep. 253; Railway Co. vs. Derby, 119 Ala. 531, 24 So. Rep. 713.

The delivery is complete when the goods are accepted for carriage, and though the statute provides that transportation shall be deemed to have commenced when the bill of lading is signed, the carrier may become liable before the goods have been actually delivered and accepted by him. East, etc., Ry. Co. vs. Hall, 64 Tex. 615.

CHAPTER VII.

COMMON LAW LIABILITY OF COMMON CARRIERS.

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COMMON LAW LIABILITY OF COMMON CARRIERS.

§ 1. In General.

The liability of the common carrier, which is the extraordinary and unusual one of insurer, commences at the time of the delivery of the goods to it for immediate transportation.[1] While both the federal and state governments have by statutory enactment to a certain extent controlled the ability of common carriers to limit their common law liability, as will be noted later, the measure of general damages to be recovered for loss of damage and delay to property in the course of transportation, is substantially controlled by the principles of the common law. At common law, the carrier is held to be an insurer of the goods received and transported by it, against losses of every kind except those arising from—

(1) The act of God;
(2) The act of the public enemy;
(3) The act of the public authority;
(4) The act of the shipper; and
(5) The inherent nature of the goods.

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(1) St. Louis, etc., R. Co. vs. Knight, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88; St. Louis, etc., R. Co. vs. Murphy, 60 Ark. 333; Merriam vs. Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344; Grand Tower Mfg., etc., Co. vs. Ullman, 89 Ill. 244; Michigan So., etc., R. Co. vs. Shurtz, 7 Mich. 515; London, etc., F. Insurance Co. vs. Rome, etc., R. Co., 144 N. Y. 200, 61 Am. & Eng. R. Cas. 225; Blossom vs. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Wade vs. Wheeler, 47 N. Y. 658; Clarke vs. Needles, 25 Pa. St. 338; Gulf, etc., R. Co. vs. Crawick, 80 Tex. 270; East Line, etc., R. Co. vs. Hall, 64 Tex. 615; Witbeck vs. Holland, 45 N. Y. 13, 6 Am. Rep. 23; Shelton vs. Merchants' Despatch Transp. Co., 59 N. Y. 258; White vs. Goodrich Transp. Co., 46 Wis. 493, 21 Am. Ry. Rep. 398.

A common carrier may, by contract, either restrict or assume more than his legal liability. Referring to the enlargement, by contract, of the carrier's legal liability, that eminent authority Hutchinson on Carriers says:

> "As a carrier may * * * to some extent restrict his liability within narrower limits than are prescribed by the law in the absence of express contract, so he may enlarge it so as to waive this limited protection which the law has always afforded him. But this must be done by clear and precise language; for the law will not imply from any doubtful language such an intention, but will rather presume, where the meaning of the contract is doubtful, that it was not his intention to waive a protection so reasonable and so important to him. Express language will be required to impose upon a party the responsibility of an insurer beyond his legal obligation, or to prevent the operation of the customary rule in cases where the act of God or inevitable accident excuses the non-performance of a contract.
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> "In Price vs. Hartshorn, 44 Barb. 655, 44 N. Y. 94, the contract of the carrier was 'to deliver without delay, damage, or deficiency in quantity to be deducted from charges by consignees.' It was contended that this contract, in the absence of words limiting his liability or reserving the benefit of the exceptions which the law made in his favor, was a contract to be liable at all events, and that he was therefore liable even for a loss which had occurred by the act of God; but the court, while admitting that it was competent for him to increase his legal obligation, held that it could not be concluded from this language that he had intended to do so, and that the contract, to have this effect, must be in direct and positive terms, and must show a clear purpose to add to his ordinary liability. So in Gage vs. Terrill, 9 Allen 399, the carrier gave a bill of lading which contained no exception to his liability from any cause

except the perils of the sea, and it was contended, as in the previous case, that **expressio unius** being **exclusio alterius,** this was a contract to assume all risks, even from the acts of God or the public enemy; but this was denied to be its effect by the court, and it was said that whilst the maxim **expressio unius exclusio alterius** generally furnished a sound rule by which to arrive at the intention of the parties to contracts, it was one to be applied with caution, and that it could not be concluded from such an argument that the carrier intended to divest himself of the protection which the law had given him. It was said, however, that had the exception in the contract been of one of those perils against which the law protected the carrier, instead of against the perils of the sea against which it did not protect him, its conclusion might have been different. See Strohn vs. Railroad, 23 Wis. 126; Morrison vs. Davis, 20 Penn. St. 171; Redpath vs. Vaughn, 52 Barb. 489.

"But where the carrier has not in any way enlarged his legal responsibility, he may always show that the loss or damage has been caused by the act of God or the public enemy, and thus escape from liability. It therefore becomes a matter of importance to determine what is meant by the words 'the act of God' in this connection, and who are to be regarded as public enemies in the sense in which the words are to be understood when thus used. It may be observed, however, that the instances for the application of these exceptions have become much less frequent in more recent times, owing to the almost universal practice which now prevails of providing by contract the extent of the responsibility which the carrier shall assume.

"It is also important to consider what other limitations, if any, the law attaches to the liability of the carrier in the absence of a contract limiting it, and it is the purpose of the present chapter to consider this subject, the question of contract limitations being reserved for the succeeding chapter."

(1) **What is an "Act of God."** While there is some conflict among the authorities as to what is meant by an "act of God," in the long course of adjudication of the common law, both in England and in this country, a fairly well fixed and definite meaning of the words has been evolved. The preponderance of authority is to the effect that the acts of God are of the nature of unavoidable and inevitable accidents. In other words, such accidents as are in no way attributable to human agency, nor the faults or negligence of the carrier. The authorities have developed two meanings of the term "act of God," one more restricted than the other. The broader view is that an act of God is "one of those misfortunes against which no skill or watchfulness on his (the carrier's) part could have guarded, and as no human agency has brought it upon him, it must be referred to that inevitable necessity, the **vis major,** which is the act of God."[2]

Mr. Hutchinson, for illustration, refers to a case of where a freshet lodges a snag in the usual channel of a river, and a vessel, following this channel as it had been used to do, strikes upon the snag, or where a hidden rock in the sea theretofore unknown to navigation or the master of the vessel, formed an obstruction against which the vessel was damaged.

The more restricted view is that the inevitable necessity arising out of an "act of God" is confined to such as violent disturbances of the elements in the form of earthquakes, floods, lightning, storms, tempests, etc. But such disturbance may not be an ordinary one, but of so stupendous a character that nothing which man may do could avoid it. This construction precludes consideration as acts of God, of the obstructions mentioned by Hutchinson.

[2] Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 270, p. 292, and cases cited in footnotes 5 to 7, both incl.

It also precludes those "causes brought about by quiet changes in the physical world, no matter how sudden; * * * for these, not being in their own nature and inherently agents of mischief and causes of danger, the loss, when it occurs by reason of them, must necessarily have sprung, in part at least, from human agency."[3]

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[3] Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 271, p. 293, citing Packard vs. Taylor, 35 Ark. 402; Gillespie vs. Railway Co., 6 Mo. App. 554; David vs. Railway Co., 89 Mo. 340; Haas vs. Railroad Co., 81 Ga. 792; Norris vs. Railway Co., 43 Fla. 182; Slater vs. Railway Co., 29 So. Car. 96; Hibernia Insurance Co. vs. Transp. Co., 120 U. S. 166; Gleeson vs. Railroad Co., 5 Mackey 356, 140 U. S. 435; Strouss vs. Railway Co., 17 Fed. Rep. 209; The Majestic, 166 U. S. P. 75, 17 Sup. Ct. Rep. 597, 41 L. Ed. 1039, **reversing** Potter vs. The Majestic, 60 Fed. 624, 9 C. C. A. 161, 20 U. S. App. 503, 23 L. R. A. 746; **s. c.**, 56 Fed. 244, 69 Fed. 844.

Still referring to the construction of the same subject, Hutchinson in his work on Carriers says:

"One of the earliest cases in this country involving this question was that of Colt vs. McMechen, 6 Johns. 160, in which the proof was that the vessel was sailing close to shore under a light wind, which, had it not suddenly failed, would have carried her safely; but suddenly failing, the vessel ran aground and the goods of plaintiff were thereby injured. The opinion of the court was delivered by Spencer, J., with whom a majority of the court agreed. 'Upon a position so plain in my apprehension,' said he, 'as that the sudden cessation of a wind which was competent, at the very moment when the vessel began to come about, for the avoidance of the shoal, was the act of God and did not arise from the fault or negligence of man, I am at a loss for further illustration.' But Kent, C. J., dissented, saying: 'I concur in the general doctrine that the sudden failure of the wind was the act of God. It was an event which could not happen by the intervention of man, nor be prevented by human prudence. But I think there was a degree of negligence imputable to the master, in sailing so near the shore under a light, variable wind, that a failure in coming about would cast him aground. He ought to have exercised more caution and guarded against such a probable event, in that case, as the want of wind to bring his vessel about. A common carrier is only to be excused from a loss happening in spite of all human effort and sagacity.'

"Of this decision it has been said that it may be fair divinity, and that upon such a philosophical theory of causation everything may be the act of God; but that it is the most extraordinary version of the principle on which a common carrier is discharged from liability that the books contain and that upon the authority of later cases it may be confidently pronounced to be wrong. (Am. Notes to Coggs vs. Bernard, Smith's Ld. Cas. p. 317.) But if a sudden gust of wind is the act of God when it causes the loss, as was held by Lord Mansfield (Amies vs. Stevens, 1 Strange 128), it would seem too plain for argument that its sudden cessation was due to the same cause, and that

That the act of God must be the proximate cause of loss in order to excuse a carrier, is agreed by all the authorities to be the proper application of the rule. So if some other agency than the act of God intervenes to cause the loss, the carrier may not plead the act of God to excuse him from liability.[4]

(2) Act of the Public Enemy. The exceptions of those losses arising from the act of the public enemy date back to the early history of the common law. If the carrier suffered loss by reason of capture by the public enemy, or, as it was then expressed, the king's enemies, the law favored him with an exception as to those losses. But this construction was placed upon the law: that the word "enemies" meant the public enemies of the country of the carrier and not of the owner of the goods. It was held in Russell vs. Neiman, 17 Com. B. (N. S.) 163, that where goods were delivered to a foreign carrier whose country was at war with another by which they were captured, it was a loss by the public enemy and he was excused from liability. Logically this was a fair exception to make in the carrier's favor because of the hardship imposed upon him were he compelled to pay for losses caused by the act of the public enemy, for he was without recourse or

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if the physical effect were the same, so should be its legal effect, aside from any negligence or want of precaution on the part of the carrier. And it would be difficult to distinguish in difference in legal effect between losses occurring from such causes, and those occasioned by the freezing up of canals and rivers, which has been repeatedly held to be the act of God which will exonerate the carrier where no fault is imputable to him. (Bowman vs. Teall, 23 Wend. 306; Parsons vs. Hardy, 14 Id. 215; Harris vs. Rand, 4 N. H. 259; Crosby vs. Fitch, 12 Conn. 410; Spann vs. Transportation Co., 11 Misc. Rep. 680, 33 N. Y. Supp. 566.)"

[4] Hart vs. Allen, 2 Watts 114; Ewart vs. Street, 2 Bailey 157; King vs. Shepherd, 3 Story 349; Siordet vs. Hall, 4 Bing. 607; Railroad Co. vs. Tapp, 6 Ind. App. 304, 33 N. E. Rep. 462; Forward vs. Pittard, 1 T. R. 33; Railroad Co. vs. Kuhn, 107 Tenn. 106, 64 S. W. Rep. 202; Jones vs. Railroad Co., 91 Minn. 299, 97 N. W. Rep. 893, 103 Am. St. Rep. 507.

remedy as against those who caused the loss. The exception did not then, and does not now, lie as to those losses which arise from the acts of mobs, riots, insurrections, and like depredations against the peace of the nation. As to those engaged in mobs, riots, insurrections and the like, the carrier might have his remedy. But a stronger motive was that there was little danger of the carrier combining with the public enemy to defraud the owners of the goods, whereas he might readily enough join with ordinary thieves and robbers to the detriment of his trust.

The modern doctrine of the common law is that the carrier is liable, unless he has protected himself from such liability by his contract, for all losses caused by thieves, robbers, mobs, riots, insurrections, and the like. Speaking of this centuries-old doctrine the court, in **Coggs** vs. **Benard,** 2 L. R. 909, said:

> "For though the force be never so great, as if a multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; or else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."

The law regards pirates as the common enemy of all mankind. Therefore, they are treated as public enemies and losses caused by them come within the exception and

the carrier suffering the losses is relieved from liability therefor.[5]

In order to constitute the relation of public enemy between the carrier and those at whose hands he suffers loss, a declaration of war is necessary if actual hostilities exist. If actual hostilities have been resorted to, all persons within the restricted hostile territories are enemies of each other. They are public enemies whether they be under arms or not and despite their personal dispositions toward either of the hostile parties.[6]

The exception in favor of the carrier from losses caused by the act of God, required that the carrier be without fault or negligence in the matter, and the same prerequisite of freedom of the carrier from fault or contribution, attaches to the exception from loss caused by the act of the public enemy. In other words, the carrier is liable for loss by the public enemy if contributed to by the carrier's negligence or deviation. In applying these exceptions in favor of the carrier, the law traces back the loss to the "first fault to which it is attributable." "For," says Hutchinson on Carriers, "if he were to land upon the enemy's coast; or being aware of his proximity, made no effort to escape or take any precautions to avoid him; or if, having the choice of two routes, he took that which was the more dangerous, or if he exposed them to capture by an inexcusable delay," the carrier may not be excused from his liability.[7]

It is not competent for the carrier to plead that loss by either act of God or the public enemy would have hap-

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(5) Story on Bailment, sec. 526; Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 316, pp. 326 and 327, and pages cited in footnotes 11 to 14, both incl.

(6) The Price Cases, 2 Black 635.

(7) Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 319, p. 330, and cases cited in footnotes 23 to 26, both incl.

pened without his negligence or deviation, for no wrongdoer may apportion or qualify his own wrong. If the loss actually happens during the continuance of the carrier's wrongful act, he cannot be heard to say that the loss would have happened if he had not committed his wrongful act. It could admit of no other construction unless the carrier could show not only that the same loss might have occurred, but that it must have occurred if the carrier's act complained of had not been done. But there is too much of uncertainty to admit of this construction of the law. So, in the case of insurers, "if the chance is varied or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable."[8]

Therefore, if the owner of the goods insures the goods against loss by the act of God or the public enemy and he loses his benefit by reason of fault or negligence of the carrier, he may recover from the carrier his loss. "And if," says Hutchinson, "instead of insuring, he chooses to take upon himself the risk of such losses, the carrier would seem to be liable to him upon the same principle. The exact question, however, seems never to have been settled by the authorities."[9]

(3) **Contraband Goods.** The effect of war on a contract of carriage is to relieve the carrier from its performance. In fact, a state of war includes the object of all belligerents to cripple each other's commerce and therefore war, of itself, operates as a legal prohibition upon the execution of contracts of carriage between hostile territories. It is not necessary for a declaration of war to issue, if a state of hostilities actually exists, in order to excuse the carrier from the performance of his contract

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[8] Pelly vs. Royal, etc., Ass. Co., 1 Burr. 341.
[9] Story on Bailments, sec. 413d.

of carriage, but this condition does not dissolve any contracts of carriage except those between points in one of the belligerent countries and those in other hostile territory, nor does it relieve the carrier from his duty to preserve the goods for the owner.[10]

It may happen that goods have been accepted by a carrier for transportation to a point in a country between which and its or another country hostilities are threatened or war is thereafter declared and the goods become contraband of war subject to seizure and confiscation. The carrier may, upon opening of hostilities or declaration of war, refuse to proceed on the journey and is thereby excused from the further performance of his contract of carriage. If the contraband goods are being transported in company with other goods not contraband of war, the carrier may unload and store such contraband goods and proceed on the journey with the goods which are not contraband of war. He is under the duty to see to it that the contraband goods are left in safe keeping, after which he will not incur further liability.[11]

(4) **The Public Authority.** A common carrier must conform with the requirements of competent public authority, and if goods are lost or injured by the act or

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[10] The Price Cases, 2 Black 635; The Teutonia, L. R. 3 Adm. 394; Exposido vs. Bowden, 7 E. L. & B. L. 762; Reid vs. Hoskins, 5 El. & Bl. 729; Baker vs. Hodgson, 3 M. & S. E. E. L. 267; Griswold vs. Waddington, 16 Johns. 438; Montgomery vs. United States, 15 Wall. 395; United States vs. Grossmayer, 9 Wall. 73; United States vs. Lapene, 17 Wall. 601; Mitchell vs. United States, 21 Wall. 350.

In Graves vs. Steamship Co., 29 Misc. Rep. 645, 61 N. Y. Supp. 115, it was held that a declaration of war will not dissolve a shipping contract between domestic ports. It is only while hostilities exist between the country to which the vessel belongs and the country to which it is bound that such a result ensues.

[11] Nobel's Explosives Co. vs. Jenkins, 2 Q. B. (1896) 326, L. J. Q. B. 638; The Styria, 101 Fed. 728, 41 C. C. A. 639, reversing 93 Fed. 474.

mandate of the public authority, the carrier is relieved from liability.[12]

The carrier is required to proceed with great care in permitting goods of an obnoxious nature, such as goods infected with contagious disease or intoxicating liquors, to be seized by the police authorities and destroyed by them. If the officer seizing the goods possesses proper legal authority for his act of seizure, the carrier is relieved from responsibility, but if such officer is not vested with proper legal authority and he seizes the goods without proper legal process, the carrier is held liable for such officer's act as a trespasser.[13]

In **Pingree** vs. **Railroad Co.**, 66 Mich. 143, the court held that "whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority." If the goods are taken from the carrier by legal process against the owner, the carrier is excused from liability. But, in order that the carrier may be relieved from his responsibility the process must be "at least fair upon its face," and must be issued against the owner of the goods.[14]

(5) **The Act of the Shipper.** Upon the principle that fraud vitiates and annuls all contracts, the carrier is

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[12] Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 324, pp. 333 and 334, and cases cited in footnote 33.

[13] Railway Co. vs. Hayman, 118 Ga. 616, 45 S. E. Rep. 491; Railroad Co. vs. Husen, 95 U. S. 465; Mugler vs. Kansas, 123 U. S. 623; License Cases, 5 How. 504; Kidd vs. Pearson, 128 U. S. 1; Bliven vs. Railroad, 35 Barb. 191, 36 N. Y. 407; Wells vs. Steamship Co., 4 Cliff. 228; Bennett vs. Express Co., 83 Me. 236, 22 Atl. Rep. 159.

[14] Hutchinson on Carriers, 3d ed., Vol. I, chap. VI, sec. 327, pp. 334 and 335, and cases cited in footnotes 38 to 41, both incl.

excused from liability for those losses arising from the fraud or fault of the owner of the goods.[14a]

If the owner of the goods contributes to their loss by fraud, concealment of value, intermeddling or mistake, the carrier is relieved from all liability for losses which result from such acts of the shipper. Where the owner of the goods unskillfully packs or loads them, or accompanies the goods and meddles with them while in the carrier's custody, or misdirects how they should be handled by the carrier, or misdirects the destination of the goods, or negligently performs any of his duties pertaining to the carriage of such goods, the carrier is excused from liability for all losses arising from such acts on the part of the owner of the goods.[15]

But the carrier may not be thus excused from its liability unless it be itself without fault.[16]

(14a) Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 328, pp. 335 and 336,—"It is an elementary principle that every man must bear the consequences of his own fraud and folly, and there is no reason for an exception to the rule as between the carrier and his employer. It was notwithstanding held in one of the earliest cases reported on the subject of the liability of the carrier that he was responsible, although the owner of the goods had practiced a gross fraud upon him by representing a box delivered for carriage as containing only a book and some tobacco, and in fact it contained also a large amount of money. The box was lost, and Rolle, J., held that as the carrier had not made a special acceptance of the box, he was liable for the loss of the money."

(15) Congar vs. Railroad, 24 Wis. 157; Lake Shore vs. Hodapp, 83 Pa. St. 22; American Express Co. vs. Perkins, 42 Ill. 458; Roderick vs. Railroad Co., 7 W. Va. 54; Railway Co. vs. Law, 68 Ark. 218, 57 S. W. Rep. 258; White vs. Winnissimet Co., 7 Cush. 155; Wilson vs. Hamilton, 4 Ohio St. 722; Ross vs. The Railroad Co., 49 Vt. 364; Rixford vs. Smith, 52 N. H. 355; Miltimore vs. Railroad Co., 37 Wis. 190; Payne vs. Ralli, 74 Fed. 563; Goodman vs. Navigation Co., 22 Ore. 14, 28 Pac. Rep. 894; Cohn vs. Platt, 94 N. Y. Supp. 535, 48 Misc. Rep. 378; Klauber vs. Express Co., 21 Wis. 21; Railway Co. vs. Kleoper (Tex. Civ. App.), 24 S. W. Rep. 567; Betts vs. Farmers, etc., Co., 21 Wis. 80; Lee vs. Railroad Co., 72 N. C. 236; Bohannon vs. Hammond, 42 Cal. 227; Smith vs. Smith, 2 Pick. 622; Brownell vs. Flagler, 5 Hill 282.

(16) Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 333, p. 340,—"The unaided negligence of the owner, where it occasions a loss, will

(6) **The Inherent Nature of the Goods.** Where ordinary care on the part of the carrier will not prevent losses arising from the inherent nature of the goods, the carrier is not liable for such losses. The transportation of perishable freight and live stock affords the most abundant opportunities for the application of this rule. And it is well settled by the authorities that if the carrier be without fault himself, he cannot be held liable for losses caused by the inherent nature, vice, defect, or infirmity of the goods themselves.[17]

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preclude him from the right to a recovery. But if the carrier himself has been guilty of some negligent act or omission without which, notwithstanding the fault of the owner, the loss would not have occurred, he will be liable," citing McCarthy vs. Railroad Co., 102 Ala. 193, 14 So. Rep. 370, 48 Am. St. Rep. 29.

(17) Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 334, pp. 341 and 342,—"So, obviously, the carrier, if not himself at fault, cannot be held liable for losses which have been caused by the inherent nature, vice, defect, or infirmity of the goods themselves, as in the case of decay, waste, or deterioration of perishable fruits, the evaporation of liquids, the bursting of vessels owing to the fermentation of their contents (Faucher vs. Wilson, 68 N. H. 338, 38 Atl. Rep. 1002, 39 L. R. A. 431), the natural death of an animal, the vicious, or uncontrollable nature of live stock, and the like (Louisville, etc., R. Co. vs. Bigger, 66 Miss. 319). An interesting case on the subject is that of Lister vs. The Railway Company, 1 K. B. (1903) 787, 72 L. J. K. B. 385, 88 Law. T. 561, 52 Wkly. Rep. 12. It there appeared that the plaintiff employed the defendant as a common carrier to transport an engine from his yard to a neighboring station. The engine was on wheels and had shafts attached by which it could be drawn. While proceeding along the highway one of the shafts broke, causing the horses attached to the engine to take fright, and the engine was upset and damaged. The break was due to a defect in the shaft, which could not have been discovered by any ordinary examination. The county judge decided that since the shaft would not have been broken but for the strain put upon it by the defendant's own act, its defective condition was no excuse. On appeal this decision was reversed, Lord Alverstone saying: "It may be that if there is no evidence of intention by the parties as to how the thing is to be carried, and there are alternative modes of carriage, one of which will give play to an inherent defect in the thing carried and the other of which will not, the carrier will be responsible if he adopts the former mode and damage results therefrom, unless, indeed, the adoption of the safer mode would involve the taking of precautions which it would be altogether unreasonable to require. But that is not the case here. It is obvious that all parties intended that the engine should be taken to the station on its own wheels. The county court judge, in thinking

§ 2. Common Law Liability as Affected by Contract.

The rigor of the common law rule, making of the carrier-bailee a full insurer of the goods carried, was early relaxed in the English courts.[18]

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that the rule as to the non-liability of a common carrier for damage caused by an inherent defect in the thing carried, was limited to cases in which the damage would equally have occurred if the thing had not been carried at all, in my opinion went to far."

See also Kendall vs. Railway Co., L. R. 7 Ex. 373; Cooper vs. Railroad Co., 110 Ga. 659, 36 S. E. Rep. 240; Illinois Central R. Co. vs. Brelsford, 13 Ill. App. 251; Warden vs. Greet, 6 Wats. 424; Swetland vs. Railroad Co., 102 Mass. 276; Lawrence vs. Denbreens, 1 Black 170; Howard vs. Wissman, 18 How. 231; Cragin vs. Railroad Co., 51 N. Y. 61.

In American Express Co. vs. Smith, 33 Ohio St. 511, 31 Am. Rep. 561, peaches were delivered to the defendant company at F., in Ohio, on the 12th for transportation to New York. The defendant sent them by the New York Central Road. On the evening of the 12th a bridge near Ithaca, on that road, was swept away by extraordinary freshet, and when the peaches arrived there it was impossible to carry them farther. As they showed signs of decay, carriers sold them for the best price obtainable, for the benefit of the owner. It was held that the carrier was not liable; it was not bound to send the peaches via another route, and merely discharge its duty in selling them as it did.

[18] Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 390, pp. 405 and 506,—"In England it has been from very early times the law that such contracts might be entered into not only expressly but by notice to the owner of the goods. The first reference to the subject is to be found in a note to Southcot's Case (4 Coke 84), in which Lord Coke says that, if goods are delivered to one person to be delivered over to another, it is good policy for him to provide for himself in special manner 'for doubt of being charged with his general acceptance;' and this language has been generally understood as having reference to the carrier as bailee; but this seems to be uncertain. In Morse vs. Slue (1 Ventris 238), it was said by Lord Hale that the mast of the ship 'might have made a caution for himself.' Nearly a century intervened during which time we find no allusion to the subject until the case of Gibbon vs. Paynton, 4 Burr 2298 (A. D. 1769), in which the attempt was made to hold the carrier liable for money delivered to him concealed in a bag filled with hay, the carrier having given notice that he would not be liable for money unless informed of the fact. Lord Mansfield, as we have seen, rested his decision upon the fraud; but the other judges considered the notice as equivalent to a special acceptance, thus assuming that the carrier could in this way limit his liability. The next heard of such special acceptance was in Forward vs. Pittard (1 T. R. 27), before the same court, in 1785, until which Burrough, J., says the doctrine of notices by carriers was never known in Westminster Hall. (Smith vs. Horne, 8 Taunt. 146.)"

Since the duties of a common carrier are public in their nature, the tendency of the courts formerly was to hold that it was against public policy, or as otherwise expressed, not just and reasonable to permit a common carrier to stipulate for any modification of his common law liability even by special contract with his customer. But in course of time the improved state of society, the introduction of better and safer modes of transportation, the diminished opportunities for collusion and bad faith on the part of the carrier, and other considerations, rendered less imperative the rigorous application of the iron rule of the common law. The result has been that the courts now uphold, as just and reasonable, numerous limitations to, or exceptions from the common law liability of carriers, which would formerly have been against public policy and void. In fact, it has now become the accepted general business usage (which is itself strong evidence as to what is in accord with public policy) for carriers and shippers to contract for some exemption from the strict liability imposed by the common law.[19]

It must be borne in mind that the recent amendments to section 20 of the Act to Regulate Commerce, known as the Cummins Amendments of 1915 and 1916, and the many state statutes prohibiting limitation of carrier's liability, have largely set aside the effect of the constructions placed upon the common law permitting the carrier by special contract, not of unreasonable tenor, to limit its common law liability. So, such rules of the common law as are discussed in the subsequent sections, must be understood to have application only in those cases wherein the common law still rules supreme.

The most extensive class of cases involving the right of

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(19) Alair vs. Railroad Co., 53 Minn. 160, 54 N. W. Rep. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764.

the common carrier to limit his liability by special contract with the shipper, arose out of the receipts or bills of lading given by the carrier to the shipper, upon receipt of the goods. The bill of lading or receipt of the carrier for the goods is more than a mere acknowledgment of the delivery of the goods and a contract to carry them. It has been used to qualify and diminish the liability imposed upon the carrier by the common law. In the absence of statute to the contrary, goods are but rarely accepted by the carrier without an agreed limitation of his liability. Both convenience and necessity are served by incorporating into the conditions of the bill of lading or receipt such limitation, and so universal has become this practice that practically every bill of lading or receipt issued by both land and water carriers embodies, as part of the conditions upon which the carrying is done, restrictions of the carrier's liability as an insurer.[20]

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(20) "And such contracts are not to be regarded as made solely in the interest or for the exclusive benefit of the carrier, though they universally qualify and moderate the harsh terms imposed upon him by the law when no express contract is made with his employer. It is supposed, however the fact may be, that, the liability of the carrier being lessened, terms correspondingly favorable have been gained by the shipper, and that thus the advantage from such contracts is to some extent mutual. It often happens that the shipper may desire by contract to vary the terms upon which alone the carrier could be compelled to receive and carry his goods, as, for instance, to bind him by what is known as a through contract, where they must necessarily be passed over several lines of connecting carriers to reach their destination. In such cases, as we have seen, the law generally in this country binds the carrier to convey only to the end of his own route and there deliver to the next succeeding carrier; but still it is perfectly competent for the carrier who first receives the goods to bind himself for the entire transportation and to be responsible for the safety of the goods until they reach their destination; and in such cases if they be lost the owner may look to him to be made whole, without undertaking the difficult task of ascertaining where the fault was or of resorting to his legal remedy in a distant state. So it frequently happens that, by entering into a contract with the carrier limiting his liability, the shipper may obtain transportation at greatly reduced rates, which he may regard as a matter of more importance to him than the liability of the carrier. Other instances might be given, but these are sufficient to show that such contracts are not

always and altogether for the benefit of the carrier."—Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 225, p. 404.

New Jersey Steam Navigation Co. vs. The Merchants' Bank, 6 How. 344; P. & R. R. R. vs. Derby, 14 How. 468; Liverpool S. S. Co. vs. Phenix Ins. Co., 129 U. S. 397; Batson vs. Donovan, 4 B. & Ald. 21; Magnin vs. Dinsmore, 56 N. Y. 168.

In England it has always been the accepted doctrine that the acceptance by the shipper, of a receipt or bill of lading, naming the limitation in express terms, constituted a special contract of shipment limiting the carrier's liability. Such a contract may or may not have been valid according to the particular terms embraced in it, but it constituted an agreement, the validity of which remained to be determined from other considerations than those involving the assent of the shipper.—American & English Encyl. of Law, tit. "Carriers of Goods."

"Shipper's Acceptance of Receipt or Bill of Lading Held Binding on Him.—The contention has been forcibly made, in a number of cases, that where the shipper merely accepts a receipt or bill of lading tendered him by the carrier, it operates, as respects any limitations or conditions expressed therein, merely as a general notice, and is not binding unless specially assented to. But this contention has been distinctly repudiated and the doctrine of the text approved in leading cases in a number of jurisdictions.

"**United States.**—Michigan Cent. R. Co. vs. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 329.

"**Arkansas.**—St. Louis, etc., R. Co. vs. Weakly, 50 Ark. 397, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

"**Kansas.**—Atchison, etc., R. Co. vs. Dill, 48 Kan. 210, 55 Am. & Eng. R. Cas. 378.

"**Kentucky.**—Adams Express Co. vs. Nock, 2 Duv. (Ky.) 563, 87 Am. Dec. 510.

"**Massachusetts.**—Grace vs. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

"**Mississippi.**—Southern Express Co. vs. Moon, 39 Miss. 832.

"**Missouri.**—Levering vs. Union Transp. etc., Co., 42 Mo. 88, 97 Am. Dec. 320.

"**New Hampshire.**—Merrill vs. American Express Co., 62 N. H. 514.

"**New York.**—Belger vs. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Kirkland vs. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475.

"**Rhode Island.**—Ballou vs. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 48 Am. & Eng. R. Cas. 31.

"**Tennessee.**—Dillard vs. Louisville, etc., R. Co., 2 Lea (Tenn.) 288 (acceptance of bill of lading sufficient proof of assent); East Tennessee, etc., R. Co. vs. Brumley, 5 Lea (Tenn.) 401.

"**Vermont.**—Davis vs. Central Vermont R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 61 Am. & Eng. R. Cas. 197. **Compare** Blumenthal vs. Brainerd, 38 Vt. 402, 91 Am. Dec. 350."

A railroad company receiving goods for shipment to a point beyond its line may, by special contract, protect itself from liability for loss occurring on its line. And such contract will be presumed from the fact that a clause thus limiting the liability is found printed in the bill of lading, although the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken bills of lading. East Tennessee, etc., R. Co. vs. Brumley, 5 Lea (Tenn.) 401.

§ 3. Adequate Consideration for Contract Limiting Carrier's Liability.

The contract limiting the common law liability of the carrier must be fairly made and freely entered into by the shipper.[21] Compare this with the rule, "that it is not essential to the validity of such a limitation that it should be shown that the shipper was aware of it, or that he had

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"A party shipped goods, to be carried by water as well as by land, and received a bill of lading containing a provision that the carrier should not be liable for loss or damage by fire or other casualty while in transit or at depots or landing at the point of delivery. The goods were safely carried to their destination and stored in a suitable warehouse, where they were destroyed by fire on the night of the next day, without any fault on the part of the carrier. It was held, that as there was no question made as to the knowledge of the shipper of the provision in the bill of lading, it would be inferred that he received it with knowledge of its contents and agreed to its terms, and consequently the carrier was not liable, although the **Illinois** rule is that the mere acceptance of a receipt containing a limitation does not bind the shipper. See **infra,** this subdivision. Anchor Line vs. Knowles, 66 Ill. 150, **distinguishing** Merchants' Despatch Transp. Co. vs. Hallock, 64 Ill. 284.

"The fact that the owner of the goods himself, or by his clerk, filled up a railroad company's receipt for goods shipped, which receipt contained a clause limiting the carrier's liability, is evidence to go to the jury of the assent of such owner to the stipulations in the receipt; but it is not conclusive, under the **Illinois** decisions, as to the fact of such assent. And where such receipt was the receipt of another company, it seems that it is inoperative even for the purpose just stated. Boscowitz vs. Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191."—American & English Encyl. of Law, tit. "Carriers of Goods."

(21) The carrier is bound to carry under his common law liability if the shipper insists upon it. Wallace vs. Matthews, 39 Ga. 617, 99 Am. Dec. 473.

Where a shipper objects to signing a special contract releasing the company from liability on the ground that he cannot see to read it and signs only upon the assurance of the clerk that it is of no consequence and a mere matter of form, the jury are warranted in finding that the goods were not delivered to be carried under the special contract. Simons vs. Great Western R. Co., 2 C. B. N. S. 620, 89 E. C. L. 620.

Under the American Decisions these contracts of limitation are not favored. Adams Express Co. vs. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510; Kansas City, etc., R. Co. vs. Simpson, 30 Kansas 645, 16 Am. & Eng. R. Cas. 158, 46 Am. Rep. 104; Hance vs. Wabash Western R. Co., 56 Mo. App. 476; Paddock vs. Mo. Pac. R. Co., 1 Mo. App. Rep. 87.

read it, or that it had been explained to him or his attention called to it, provided the carrier made use of no improper means to prevent his noticing or objecting to it."[22]

At common law a common carrier is required to accept goods tendered to him for carriage if they are of the class and kind which he professes to transport, and if he inserts a provision in the shipping contract limiting his liability for loss or injury to the goods, there must be some consideration other than the mere contractual relation of the parties moving from the carrier to the shipper for the special contract.[23] Ordinarily, but not necessarily, this consideration is a reduced rate of carriage. For such consideration to be a valid one in law, rates of transportation offered the shipper must be reasonable and the shipper must have a genuine freedom of choice in making his selection;[24] the rules to the contrary being that if no such freedom of choice is afforded the shipper, and the offer of a difference in rates of transportation is a mere form,

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(22) See footnote 20, **ante.**

(23) Southard vs. Minneapolis, etc., R. Co., 60 Minn. 382; Wehmann vs. Minneapolis, etc., R. Co., 58 Minn. 22, 61 Am. & Eng. R. Cas. 273.

(24) Atchison, etc., R. Co. vs. Dill, 48 Kan. 210, 55 Am. & Eng. R. Cas. 375; Duvenick vs. Mo. Pac. R. Co., 57 Mo. App. 550.

In Gulf, etc., R. Co. vs. McCarty, 82 Tex. 608, it was held that if the special contract recites that "in consideration of reduced freight," a shipper consents to a limitation of the carrier's liability, and it is shown that those reduced rates were in fact allowed the shipper, the limitation is invalid as being without a consideration. Gulf, etc., R. Co. vs. Wright, 1 Tex. Civ. App. 402. See also Louisville, etc., R. Co. vs. Sowell, 90 Tenn. 17, 49 Am. & Eng. R. Cas. 166; San Antonio, etc., R. Co. vs. Barnett (Tex. Civ. App. 1896), 34 S. W. Rep. 139; Kellerman vs. Kansas City, etc., R. Co. (Mo. 1896), 34 S. W. Rep. 41.

If the special contract recites that "in consideration of reduced rates," the shipper consents to a limitation of the carrier's liability, and it is shown that no reduced rates were in fact allowed the shipper, the limitation is invalid as being without a consideration. Gulf, etc., R. Co. vs. McCarty, 82 Tex. 608; Gulf, etc., R. Co. vs. Wright, 1 Tex. Civ. App. 402.

the contract limiting the carrier's liability is without consideration and cannot be upheld.[25]

Where the provisions of the contract do not actually limit the common law liability of the carrier, although they may affect it to some extent through stipulations requiring notice of claim for damages to be filed within a specified time or confining the carrier's liability to losses occurring on its own line, they are valid without showing of any consideration.[26]

The question frequently arises, by what law is the validity of a special contract limiting the carrier's liability

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(25) Paddock vs. Missouri Pac. R. Co., 1 Mo. App. Rep. 87; Duvenick vs. Missouri Pac. R. Co., 57 Mo. App. 550.

See also where the local agent of the company has no authority to offer transportation except at a particular rate fixed by his superiors, there can be no real option offered to the shipper by him, and none can be set up as a consideration passing to the shipper in support of the special limitation of liability.—American & English Encyl. of Law, tit. "Carriers of Goods," and cases cited in footnote 2, p. 299.

See also I. C. R. Co. vs. Lancashire Insurance Co., 79 Miss. 114; Ward vs. M. P. Ry. Co., 158 Mo. 226; Adams Express Co. vs. Carnahan, 29 Ind. App. 606; McFadden vs. Missouri Pac. R. R. Co., 92 Mo. 343; York Co. vs. Central R. R. Co., 3 Wall. 107; Louisville, etc., R. Co. vs. Oden, 80 Ala. 38.

The shipper cannot evade the limitations imposed by the special contract by showing that he executed it hurriedly or without due care, nor by showing that it was a part of the provisions of the contract. If he executes the contract by affixing his signature, or by accepting without objection a receipt containing the limitation, he will be conclusively presumed to have assented to its provisions, no fault on the part of the carrier appearing.

The special contract limiting the carrier's liability must have been made at the time of shipment of the goods; if not made then or earlier it will be conclusively presumed that the shipment was made subject to the common-law rules as to the carrier's liability, and this liability cannot be lessened by subsequent agreement. A stipulation contained in a bill of lading, which attempts to limit a carrier's liability, is void where the bill is not delivered until after the shipment of the goods or their loss.—American & English Encyl. of Law, tit. "Carriers of Goods," and footnotes 1 and 2 to page 301.

(26) It is no part of the carrier's duty to carry beyond its own line, and a stipulation confining its liabilities or losses on its own line is virtually no limitation at all.—American & English Encyl. of Law, tit. "Carriers of Goods," footnote 4 to page 300.

See also Hance vs. Wabash Western R. Co., 56 Mo. App. 476, Crow vs. Chicago, etc., R. Co., 57 Mo. App. 135.

to be governed. The nature, obligation and interpretation of such a contract, unless it appears that the parties when entering into the contract intended it to be bound by the law of some other state, are bound by the law of the place where the contract is made. This is logically so, for such contracts are to be performed partly, if not wholly, in the state where they are entered into.[27]

The rule in the federal courts in determining the validity of such contracts, is different from that followed by state courts. A contract releasing the carrier from all liability whatever, even for losses caused by negligence, is held, in the federal courts, to be repugnant to public policy, and will not be enforced, although it may be valid under the law of the state in which it was entered into.[28]

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(27) Merchants' Despatch Transp. Co. vs. Furthman, 149 Ill. 66, 61 Am. & Eng. R. Cas. 145; Michigan Central R. Co. vs. Boyd, 91 Ill. 268; Brooke vs. New York, etc., R. Co., 108 Pa. St. 530, 56 Am. Rep. 235, 21 Am. & Eng. R. Cas. 64; Brown vs. Camden, etc., R. Co., 83 Pa. St. 316.

Where goods are delivered to a carrier in another state, the contract to be performed there, the laws of that state will govern as to the construction of the contract, and will determine the extent of the carrier's undertaking, and, so far as they are the common or unwritten law, may be proved by the testimony of competent witnesses.—American & English Encyl. of Law, tit. "Carriers of Goods," footnote 1 to page 304, citing Milwaukee, etc., R. Co. vs. Smith, 74 Ill. 197. See other cases cited in same footnote.

(28) Liverpool, etc., Steam Co. vs. Phenix Insurance Co., 129 U. S. 397, 37 Am. & Eng. R. Cas. 688, 22 Blatchf. (U. S.) 397, 22 Fed. Rep. 728.

In the Guildhall, 58 Fed. Rep. 796, and the Hugo, 57 Fed. Rep. 403, the holding in Lewisohn vs. National S. S. Co., 56 Fed. Rep. 602, was followed. In the Lewisohn case the contract was for shipment in an English vessel and expressly provided that its validity should be determined by the law of the flag. The contract was made in England. It was held that the stipulation therein releasing the carrier from liability for the consequences of its negligence was contrary to public policy and would not be enforced. The fact that it was made in England, where such contracts are valid, would not alter the rule.—American & Eng. Encyl. of Law, tit. "Carriers of Goods," footnote 3 to page 304.

§ 4. Refusal of Carrier to Accept Shipment Under Common Law Liability.

A common carrier cannot lawfully require, as a condition precedent to his acceptance of a shipment, that the shipper execute a contract limiting the carrier's common law liability.[29] The effect of the present amendments to section 20 of the Act to Regulate Commerce is to afford the shipper the carrier's full insurer's liability at the published tariff rates of carriage.[30]

§ 5. Effect of Consignor or Consignee Making Contract with Carrier.

Where the consignor enters into a special contract with the carrier as to the terms of shipment and there is no proof to the contrary that the consignor has authority so to do, the consignee is bound by the terms of the contract including, if such be the case, limitation of the carrier's liability.[31] This is a presumption in law relieving the carrier from the duty of inquiring as to the consignor's authority. If the consignor in fact exceeded his authority in consenting to limitations of the carrier's liability, the latter cannot be made to suffer thereby without notice that the consignor had exceeded his authority.[32]

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(29) K. P. R. R. Co. vs. Reynolds, 17 Kan. 251.

(30) Act to Regulate Commerce as amended, sec. 20.

(31) Brown vs. Louisville, etc., Ry. Co., 36 Ill. App. 140; McMillan vs. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Squire vs. New York Central R. Co., 98 Mass. 239, 93 Am. Dec. 162; Craycroft vs. Atchison, etc., R. Co., 18 Mo. App. 487; Shelton vs. Merchants' Despatch Transp. Co., 59 N. Y. 258; Ryan vs. Missouri, etc., R. Co., 65 Tex. 13, 23 Am. & Eng. R. Cas. 703, 57 Am. Rep. 589; York Co. vs. Illinois Central R. Co., 3 Wall. (U. S.) 107; Barnett vs. London, etc., R. Co., 5 H. & N. 604; Southern Pacific R. Co. vs. Maddox, 75 Tex. 300.

(32) Moriadi vs. Harnden's Express, 1 Daly (N. Y.) 227; Briggs vs. Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Meyer vs. Harden's Express Co., 24 How. Pr. (N. Y. C. Pl.) 290.

But where the consignee makes a contract with the carrier, the consignor is not bound thereby unless he has assented thereto.[33]

A consignor is bound by the act of his agent, where he sends such agent to the depot of the carrier with his goods for shipment and such agent enters into a special contract with the carrier as to the terms of carriage and limiting the carrier's liability. The acceptance of the bill of lading by such agent of the consignor implies his authority so to do and binds his principal.[34]

§ 6. Effect of Shipper's Acceptance of Carrier's Receipt.

The acceptance of the carrier's receipt by the shipper creates a contract according to its terms between the shipper and the carrier, and failure to read such receipt will not repudiate the contract if no fraud is practiced. "As in England, the land carriage of this country is nearly engrossed by railways, canals, and express companies, and the usage as to their manner of contracting with their employers is in effect the same. When goods are delivered to them receipts are usually given in which are stated the terms as to the liability of the carrier on which they are to be carried, which are treated in all respects as to their legal effect as bills of lading; and it was never doubted that the bill of lading of the carrier by water was not only the receipt of the carrier for the goods, but an express contract between him and the shipper as to every exception of liability in it. And no reason is perceived why different legal effect should be given to the latter merely because they relate to carriage by water, unless it

(33) White vs. Goodrich Transp. Co., 46 Wis. 493, 21 Am. Ry. Rep. 398.

(34) Sheldon vs. Merchants' Despatch Transp. Co., 59 N. Y. 258; Zimmer vs. New York Cent., etc., R. Co., 137 N. Y. 460; Smith vs. Southern Express Co., 104 Ala. 387.

be upon the ground of the antiquity of their use for that purpose. Hence, most of the American cases * * * while denying the right of the carrier to protect himself by public or general notices, even when brought home to the knowledge of the bailor, have treated such receipts as creating contracts sufficiently special for that purpose, without inquiring whether they have been read or explained to, or understood, or expressly assented to, by the shipper or bailor or not, provided the carrier has resorted to no unfair means of deception, and the employer has had the opportunity to know the contents of such receipt if he had so desired. And this is in accordance with the English decisions. Nor is there anything unreasonable in this. Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be wilfully blind and plead ignorance when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold a carrier to his common-law liability he should have said so, and have declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services and risk."[35]

But this is not the rule in all states. In Illinois, in order that the owner of the goods may be bound by the limitations contained in the receipt of the carrier, it must be shown that the owner assented to its conditions or restrictions when he accepted it from the carrier, and that

(35) Hutchinson Carriers, 3d ed., Vol. I, chap. VI, sec. 408, pp. 422 and 423, and cases cited in footnotes 38 to 41, both incl.

whether there was such an assent on his part must be determined by the jury on evidence **aliunde** and from all the circumstances attending the acceptance. The burden of proof is cast upon the carrier to show that such conditions were assented to by the shipper. This rule is founded upon the principle that the mere acceptance by the owner of the goods of a receipt containing terms or conditions intended to alter or modify the common carrier's common-law liability is insufficient to constitute a contract between the parties according to such terms or conditions. To this view the courts of Illinois have adhered until it has become the settled law of that state.[36]

§ 7. Contracts Limiting Liability Strictly Construed Against the Carrier—Test.

The law looks without favor upon all contracts limiting the common law liability of a carrier. It is reluctant to permit any divestment by the carrier of his duty and obligation under the common law and construes all contracts limiting his liability strictly against him. There are many holdings to the effect that where such contracts between the carrier and the shipper depend upon notices of the carrier or upon terms and conditions which the carrier has injected into his receipts, if there be doubt or ambi-

(36) Gaines vs. The Union Transp. Co., 28 Ohio St. 418, referring to the Illinois rule as declared in Adams Express Co. vs. Haines, 42 Ill. 89; Adams Express Co. vs. Stettaners, 61 Ill. 184; Anchor Line vs. Dater, 68 Ill. 369; Illinois Cent. R. Co. vs. Frankenberg, 54 Ill. 88; Field vs. Railroad, 71 Ill. 458; U. S. Express Co. vs. Haines, 67 Ill. 137; Merchants' Despatch Co. vs. Leysor, 89 Ill. 43. See also Ill. App. 180, 106 Ill. 563, 55 Ill. App. 159, 41 Ill. App. 607, 159 Ill. 53, 160 Ill. 648, **affirming** 57 Ill. App. 502, and 194 Ill. 9, **affirming** 96 Ill. App. 337.

In Anchor Line vs. Knowles, 66 Ill. 150, it was held that if the receipt contained a provision that the carrier should not be liable for loss by fire or other casualty, and no question was made as to the shipper's knowledge of his contents, it must be inferred that he had such knowledge at the time of the shipment, and agreed to its terms.

guity in such notices, or in the language of the receipts, it will be resolved in favor of the shipper and against the carrier. So, it has been held, that clauses exempting the owner of the vessel from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and are not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage.[37]

A special contract limiting the carrier's liability must be just and reasonable in the terms and conditions which it sets up as the agreement between the carrier and the shipper. The question of what is just and reasonable has given rise to much consideration by the courts. In the American & English Encyclopaedia of Law the test of what shall be considered just and reasonable terms of such a contract is stated as follows:

> "The rule to be gathered from the general tenor of the decisions seems to be that there must have been a sufficient consideration given by the carrier for the reduced liability; that a fair and genuine option must have been given to the shipper of choosing between the two kinds of contracts, one calling for a high rate of freight with no limitations of the carrier's liability, and the other for a lower rate with limitations; both rates, however, being reasonable."[38]

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(37) The Garib Prince, 170 U. S. 655, 18 Sup. Ct. Rep. 753, reversing 68 Fed. 254, and 63 Fed. 266. Compare the Burlew, 55 Fed. 1003, 5 C. C. A. 386, 8 U. S. App. 405; The Maori King vs. Hughes, 2 Q. B. (1895) 550, 65 L. J. Q. B. 168.

(38) American & Eng. Encyl. of Law, tit. "Carriers of Goods," and footnote 1 to page 317, citing Gallagher vs. Great Western R. Co., 8 I. R. R. C. L. 326; Lloyd vs. Waterford, etc., R. Co., 15 I. R. C. L. R. 37; Foreman vs. Great Western R. C., 38 L. T. N. S. 851; Great Western R. Co. vs. McCarthy, L. R. 12 App. 218, 29 Am. & Eng. R. Cas. 87; Great Western R. Co. vs. Glenister, 29 L. T. N. S. 422, 22 W. R. 72; Taubman vs. Pacific Steam Nav. Co., 26 L. T. 704; Steel vs. State Line S. S. Co., L. R. 3 App. 72; Hill vs. Scott (1895), 2 Q. B. 371; Norman vs. Binnington, 25 Q. B. Div. 475.

If anything, the rule is more strictly applied in this country than by the English courts. Generally speaking, a carrier may, by special contract, limit his common-law liability, in the absence of statutory prohibition, according to the provisions of the courts of this country. The rulings of our courts have been uniform to the effect that a carrier, within the limits allowed by public policy and considerations of right and justice, by special contract, may limit and qualify its liability as an insurer of goods. In other words, the carrier may enter into stipulations which do not relieve it in any degree from its responsibility for negligence, if the shipper assents and agrees to them by a special contract, either verbal or in writing. The rule of reasonableness is set up by our courts. If a carrier has sought to contract to establish a condition precedent to his liability for damages, it must be proven that the contract is reasonable. So, it has been held that a contract releasing a carrier of powder from liability for fire from any cause whatsoever is not void, as unconscionable or unreasonable.[39]

"There is no such thing as reasonableness in the abstract, and in dealing with conditions by which a company limits their liability it is necessary to take into consideration the facts with reference to which they would be reasonable or unreasonable. * * * For a condition reasonable as to one state of facts may be applied to another state of facts which makes it unreasonable. * * * The reasonableness or unreasonableness of a condition will materially depend upon the nature of the article to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company were bound by the common law or by statute to carry articles on being paid the customery hire, or whether it was in their power to reject them altogether and refuse to carry them on any terms, and whether or not the customer had a reasonable alternative offered of having the goods carried free from such restricted conditions."—Redman's Law of Railway Carriers, page 65.

[39] The Pacific, Fed. Cas. No. 12644 (Deady 17); Leich vs. Union R. R. Transp. Co., Fed. Cas. No. 8224; South & N. W. R. Co. vs. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Grey vs. Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Merchants' Despatch Transp. Co. vs. Ley-

sor, 89 Ill. 43; Thayer vs. St. Louis, A. & T. H. R. Co., 22 Ind. 26, 85 Am. Dec. 409; Bartlett vs. Pittsburgh, C., C. & St. L. Ry. Co., 94 Ind. 281; Indianapolis, C. & W. Ry. Co. vs. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Louisville & N. R. Co. vs. Crozier, 13 Ky. Law Rep. 175; Robert vs. Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Kirby vs. Adams Express Co., 2 Mo. App. 369; Craycroft vs. Atchison, T. & S. F. Ry. Co., 18 Mo. App. 487; Mercantile Mutual Ins. Co. vs. Chas, 1 E. D. Smith 115; Dorr vs. New Jersey Steam Nav. Co., 6 N. Y. Super Ct. (4 Sandf.) 136; Stoddard vs. Long Island R. R. Co., 7 N. Y. Super. Ct. (5 Sandf.) 180; Moore vs. Evans, 14 Barb. 524; Dorr vs. New Jersey Steam Nav. Co., 11 N. Y. (1 Kern) 485, 62 Am. Dec. 125; Sunderland vs. Westcott, 40 How. Prac. 468, 32 N. Y. Super Ct. (2 Sweeny) 260; Blossom vs. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Landsberg vs. Dinsmore, 4 Daly 490; Slocum vs. Fairchild, 71 Hill 292; Davidson vs. Graham, 2 Ohio St. 131; Graham vs. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Jaines vs. Union Transp. & Ins. Co., 28 Ohio St. 418; Bingham vs. Rogers, 6 Watts & S. 495, 40 Am. Dec. 581; Luscesco Oil Co. vs. Pa. Ry. Co., 2 Pittsb. R. 447; Swindler vs. Hilliard, 2 Rich. Law. 286, 45 Am. Dec. 732; Houston & T. C. R. Co. vs. Park, 1 White & W. Civ. Cas. Ct. App. sec. 334; Baltimore & O. Ry. Co. vs. Skeels, 3 W. Va. 556.

See also the following cases holding power in the carrier to limit its liability in general, but that there can be no stipulation for any exception which is not just and reasonable in the eye of the law: The City of Clarksville, 94 Fed. 201; Woodburn vs. Cincinnati, N. O. & T. Ry. Co. (C. C.), 40 Fed. 731; Vormsby vs. Union Pacific R. Co. (C. C.,) 4 Fed. 706 Barron vs. Mobile & Ohio R. Co., 56 So. 862; Pacific Express Co. vs. Wallace, 60 Ark. 100, 29 S. W. 32; Kansas & A. V. Ry. Co. vs. Ayers (Ark.), 78 S. W. 515, 63 Ark. 331; California Powder Works vs. Atlantic & P. R. Co., 113 Cal. 329, 45 Pac. 691; Union Pac. R. Co. vs. Stupeck, 114 Pac. 646; Southern Express Co. vs. Barnes, 36 Ga. 532; McIntosh vs. Oregon R. R. & Nav. Co., 105 Pac. 66, 17 Ida. 100; Fields vs. Chicago & R. I. R. Co., 71 Ill. 458; Illinois Central R. Co. vs. Jonte, 13 Ill. App. (13 Bradw.) 424; Baltimore & Ohio S. W. R. Co. vs. Ross, 105 Ill. App. 54; Coats vs. Chicago, R. I. & P. Ry. Co., 134 Ill. App. 217; McCoy vs. K. & D. M. R. Co., 44 Iowa 424; Hazel vs. Chicago, M. & St. P. Ry. Co., 82 Iowa 477, 48 N. W. 926; Winn vs. American Express Co., 128 N. W. 663; Sprague vs. Missouri Pac. Ry. Co., Pac. 465, 34 Kan. 347; Lewis vs. Louisville & N. R. Co., 122 S. W. 184; Thomas vs. The Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509; Young vs. Maine Central R. Co., 93 Atl. 48; McCoy vs. Erie & W. Transp. Co., 42 Md. 498; Cox vs. Vermont Central R. Co., 170 Mass. 129, 49 N. E. 97; Michigan Cent. R. Co. vs. Hale, 6 Mich. 243; McMillan vs. Michigan Southern & N. I. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Michigan Southern & N. I. R. Co. vs. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Fiege vs. Michigan Cent. R. Co., 62 Mich. 1, 28 N. W. 685; Smith vs. American Express Co., 108 Mich. 572, 66 N. W. 479; O'Malley vs. Great Northern Ry. Co., 86 Minn. 380, 90 N. W. 974; Murphy vs. Wells, Fargo & Co., 199 Minn. 230, 107 N. W. 1070; Mobile & Ohio R. Co. vs. Franks, 41 Miss. 494; Dotts vs. Wabash, St. L. & P. Ry. Co., 17 Mo. App. 394; McElvin vs. St. Louis & S. F. R. Co., 131 S. W. 736; Penn Clothing Co. vs. United States Express Co., 48 Pa. Super. Ct. 520; Louisville & N. R. Co. vs. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162;

Deming vs. Merchants' Cotton Press & Storage Co., 90 Tenn. (6 Bickle) 306; 17 S. W. 89, 13 L. R. A. 518; Heaton vs. Morgan's L. & D. R. R. R. & S. F. Co., 1 White & W. Civ. Cas. Ct. App. sec. 774; Benson vs. Oregon Short Line R. Co., 99 Pac. 1072; Larsen vs. Oregon Short Line R. Co., 110 Pac. 983; Kimball vs. Rutland & C. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Chesapeake & O. R. Co. vs. Beasley, Couch & Co., 52 S. E. 566, 104 Va. 788, 3 L. R. A. (N. S.) 183; Southern Express Co. vs. Keeler, 64 S. E. 38; Boorman vs. American Express Co., 21 Wis. 152.

Compare the rule in the following states:

Georgia.—The rule in force in Georgia that a carrier cannot limit his liability for loss of goods resulting from negligence is not affected by the Act to Regulate Commerce, as amended June 29, 1906, sec. 10, nor by the Elkins Act, as amended June 29, 1906.—Adams Express Co. vs. Mellichamp, 75 S. E. 596, 138 Ga. 443.

Illinois.—It is the law in this state, first, that the liability of a common carrier is that imposed by the common law; second, that a restriction in a bill of lading to the contrary is insufficient of itself to relieve the carrier from the liability created by the common law; third, the limitation of liability, to be effective, must rest in an express contract; fourth, that the onus of proving an exemption from the liability imposed by the common law is on the carrier; and, fifth, the examination of the question of fact as to whether or not an express contract limiting the carrier's liability exists is for the jury.—Coats vs. Chicago, Rock Island & Pacific Ry. Co., 134 Ill. App. 217.

Kansas.—A contract, or any provision thereof, made by a railroad company with a shipper to transport stock or other property from one point to another in this state, that changes or limits the common-law liability of the company as a common carrier, except when made as provided by regulation or order of the board of railroad commissioners, is void.—St. Louis & S. F. Ry. Co. vs. Sherlock, 51 Pac. 899, 59 Kan. 23; (App. 1897) St. L. & S. F. Ry. Co. vs. Tribbey, 50 Pac. 458, 6 Kan. App. 467.

Michigan.—The charter of the Michigan Central Railroad is in the nature of a contract between the company and the state, permanently binding upon each, and the principal engagement on the part of the company is that they shall become and continue to remain common carriers. Their liability as common carrier, consequent upon the contract and the law appertaining thereto, becomes irrevocably fixed. They cannot alter or modify this liability by any stipulation or contract.—Michigan Central R. Co. vs. Ward, 2 Mich. 538.

Nebraska.—A railroad company operating a line of railroad in Nebraska is a common carrier, and cannot, under Const., sec. 4, art. 11, limit its liability, as such, by special agreement with a shipper—Missouri Pacific Ry. Co. vs. Vandeventer, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129; Chicago, B. & Q. R. Co. vs. Gardiner, 51 Neb. 70, 70 N. W. 508; (1906) Wabash R. Co. vs. Sharpe, 76 Neb. 424, 107 N. W. 758.

Texas.—A common carrier is liable for all losses of, or injuries to, goods received by him for carriage, not occasioned by the act of God or public enemies, and this liability cannot be limited by contract.—Texas Express Co. vs. Scott, 2 Willson, Civ. Cas. Ct. App., sec. 73; Texas & P. Ry. Co. vs. Richmond, 63 S. W. 619, 94 Tex. 571; Head vs. Pacific Express Co., 126 S. W. 682.

§ 8. When Parole Agreement Not Limited by Receipt.

Where goods have been delivered to a carrier and the transportation begun under a verbal agreement as to the terms of carriage, the subsequent delivery to the owner of the goods of a bill of lading or receipt purporting to establish different conditions of shipment, will not vary the terms of the parole agreement.[40]

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[40] Guillaume vs. Transportation Co., 100 N. Y. 491; Wheeler vs. R. Co., 115 U. S. 29; Missouri Pac. Ry. Co. vs. Beeson, 30 Kan. 298; Swift vs. Steamship Co., 106 N. Y. 206; Wilde vs. Transportation Co., 47 Iowa 247; Merchants, etc., Co. vs. Furthman, 149 Ill. 66, 36 N. E. Rep. 624, 41 Am. St. Rep. 265; Caldwell vs. Railway Co., 21 Ky. Law Rep. 397, 51 S. W. Rep. 575; Railway Co. vs. Clark, 48 Kan. 321, 329, 29 Pac. Rep. 312; Railroad Co. vs. Cooper, 21 Ky. Law Rep. 1644, 56 S. W. Rep. 144.

CHAPTER VIII.

LIMITATION OF LIABILITY.

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§ 1. What Liability May Be Limited.

The original Cummins Amendment to the twentieth section of the Act to Regulate Commerce, which became effective June 3, 1915, was in reality an amendment to the Carmack Act which had previously amended the same section of the Commerce Act and was intended to prevent the railroads limiting their liability by contract. There were, however, some exceptions in the amendment to the application of the prohibition. Among those exceptions was one providing that the terms of the Act should not apply to goods hidden from view by wrapping, boxing, or other means. Objection was raised to the language of the Act as used and considerable difficulty in construing the amendment was experienced. The Interstate Commerce Commission approved a change in the wording of the Cummins Amendment of 1915 for the reasons, **first,** so that the Act should not apply to baggage, to which it was not intended in the original Act it should apply, and, **second,** so that the terms of the Act should not apply to those particular forms of merchandise which had been especially listed by the Interstate Commerce Commission and on which rates had been particularly made, sometimes dependent upon the value of the goods. It was the express desire of the Interstate Commerce Commission that such merchandise should be taken out, and to meet these two particular conditions, a reamendment of the Act was passed and became effective August 29, 1916.[1]

(1) The Cummins Amendment, "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen

hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six.

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: **Provided, however** That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to Regulate Commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish

The law prohibits any common carrier engaging in interstate commerce to in anywise limit its common carrier liability to include any limitation of liability or limitation of the amount of recovery or representation or agreement as to the value of the goods in any receipt or bill of lading or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission, declaring any such limitation, without respect to the manner or form in which it is sought to be made, unlawful and void, and such carrier is liable to the party entitled to recover on the goods for the full actual loss, damage, or injury to the goods, except that such provision respecting liability for full actual loss, damage, or injury notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, shall not apply to (1) baggage carried on passenger trains or boats, or trains or boats carrying passengers; and (2) to property except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the

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rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: **Provided further,** That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: **Provided further,** That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: **Provided, however,** That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." 39 U. S. Stats. at Large, 556.

Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released.

The further provision is made that nothing in the amended section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. The carrier is also forbidden to provde by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suit for a shorter period than two years. And the notice of claim or filing of claim is waived as a condition precedent to recovery where the loss, damage, or injury complained of was due to delay or damage while the goods were being loaded or unloaded, or damaged in transit by carelessness and negligence of the carrier.

It is clearly the intent of the amended section to prevent common carriers engaging in interstate commerce from in anywise limiting their full liability as insurers of the goods carried except as a tariff condition relating to rates established under the authority of the Interstate Commerce Commission and to leave such carriers free to limit their liability as to the baggage of passengers within their rights under the common law.

As was stated in the last preceding chapter, several of the states entirely prohibit limitation of the common carrier's liability, and since this volume is devoted to an abridgement of those many and varied principles and rules

of the common law, and as it has been adjudicated and interpreted both by the courts of England and of this country, the subsequent sections of this chapter will be confined to the rights of common carriers to limit their liability at common law where other and superior jurisdictions have not removed its application.

With the exception of relieving itself from liability for such losses as arise from its own negligence as common carrier by special contract, the terms of which are reasonable and just, the common carrier may limit its liability arising from any cause almost without limit. Stating the rule in its broadest aspect, a common carrier can limit its common law liability by special contract and exempt itself from liability for any loss resulting otherwise than by negligence of itself or servant.[2] The carrier may limit its liabilities as to losses caused by (1) the act of God, (2) the public enemy, (3) the public authority, (4) the negligence of the owner of the goods, (5) the inherent nature of the goods, (6) delay, (7) theft, (8) breakage or leakage, (9) fire, (10) acts of forwarders, (11) acts of employees or agents, and (12) acts of connecting lines.

§ 2. Limitation Where Losses Caused by Delay.

Inasmuch as there is substantial conflict of laws[3] as to

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(2) Morse vs. Canadian Pacific Ry. Co., 97 Me. 77, 53 Atl. 874; Russell vs. Erie R. Co., 59 Atl. 150, 70 N. J. Law 808, 67 L. R. A. 433; Cincinnati, H. & D. R. Co. vs. Berdan, 22 Ohio Cir. Ct. R. 326, 12 Ohio C. D. 481; Nicolette Lumber Co. vs. People's Coal Co., 26 Pa. Super. Co. 575, **reversed** (1906) 62 Atl. 1060, 213 Pa. 379, 3 L. R. A. (N. S.) 327, 110 Am. St. Rep. 550.

(3) The general proposition that the validity of a contract is to be determined by the law of the place where the contract is made and not by that of the forum is applied in the construction of contracts made in this country for transportation of goods to another country, and a limitation of liability which is invalid where the contract is made will not be given effect in our courts, although the provision would have been valid if made in the country to which the goods are

the validity of contracts limiting the carrier's liability, it must be borne in mind that the rules referred to in the subsequent sections devoted to the subject of limitation of liability, have no more particular application than within the state in which they are declared to exist, except that rulings of the United States courts are of general jurisdictional effect throughout the country. Under the

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shipped. The converse of the general proposition is equally true, that if a limitation of liability is valid where the contract of shipment is made for transportation from that state or country to another state or country, the validity of such stipulation will be upheld in the courts of a state or country where such limitation would be invalid. Thus, a limitation in a contract of shipment made in one state for transportation of goods from that state into another will be upheld in the courts of the latter state if valid where made, although, if the limitation had been made in the state of the forum, it would have been invalid by reason of statutory prohibition or of the general rule of construction with reference to such contracts. And the fact that a contract limiting the liability of a railroad company is invalid by statute in the state where the company is incorporated will have no effect in determining the validity of a contract by such company made in a state where the limitation of liability is valid with reference to transportation into another state than that where the company is incorporated. Some countenance was given in an English case to the idea that parties making a contract of shipment in one country might do so with reference to the law of another country, so that such contract would be construed with reference to the law of the latter country, rather than the law of the former, but the courts of this country have not countenanced the idea that the parties may thus select the law of some other country as determining the validity of a limitation of liability in a contract made here, and it has been held that in contracts made in this country for transportation of goods to another country it cannot be stipulated that the validity of the contract shall be determined by the law of the "flag" under which the ship sails. Such a provision will not be effectual to incorporate the law of the ship's country into a contract so as to make it valid if it would not be valid where made. The rule that the validity of limitations is to be determined by the law of the country where the contract of shipment is made seems to be subject to this qualification, that the courts of this country will not recognize as valid a limitation in such contract of shipment from another country to this, even though valid where the contract is made, if the limitation is contrary to the general policy of the law of this country. And accordingly it has been said that a limitation of liability in a shipping contract, valid in the state where made for transportation to another state, will not be recognized in the courts of the latter if contrary to the general policy of that state.—"Cyc," tit. "Carriers," pp. 410 to 412, and cases cited in footnotes 42 to 51, both incl.

authority of the Croninger Case,[3a] the provisions of the Cummins Amendment to the Act to Regulate Commerce are intended with respect to interstate shipments to do away with the many conflicting rules in the various states pertaining to the right of the carrier to limit its liability. The national legislation was designed, so far as interstate shipments are concerned, to prescribe a uniform rule whereunder the right of a carrier to limit its liability is brought within the federal authority as to interstate shipments, and the statutes of states respecting such right supplanted thereby.

A consignor may, by express contract, waive the common carrier's liability for losses arising from delay or detention of the goods under any circumstances.[4] But a clause in a bill of lading stipulating that the goods will be carried "at the convenience of the company" will not protect the carrier from liability for unreasonable delay.[5]

In Texas, it has been held that whenever a railroad company receives stock to be transported over its road from one place to another, it assumes all the responsibility of a common carrier. It cannot maintain the defense that, under its contract with the shipper, it acted only as a mere forwarder or private carrier for hire, and was released from any liability to the shipper for delay in receiving or forwarding the stock.[6]

Texas Revised Statutes, article 278, prohibits carriers from limiting their common-law liability by notice or contract. A stipulation, exempting the carrier from all risk of damage, because of any delay in transportation not

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(3a) Adams Express Co. vs. Croninger, 226 U. S. 491.
(4) Hartness vs. Great Western R. Co., 2 Mich. N. P. 80.
(5) Branch vs. Wilmington & W. R. Co., 88 N. C. 573.
(6) Texas & P. Ry. Co. vs. Ham, 2 Willson, Civ. Cas. Ct. App. sec. 493.

resulting from wilful negligence of its servants, is invalid in that state.[7]

Under the construction of the Carmack Amendment to the Act to Regulate Commerce permitting carriers to limit liability for damages to property, it was held in North Carolina[8] that a carrier could not limit its liability for special damages from delay in delivery, including damages for mental anguish.

And a stipulation in a bill of lading that a carrier should not be liable for delay caused by strikes has been held to be just, reasonable, and not inconsistent with public policy.[9]

The general rule is that a carrier may not limit its liability for delay except by special contract with the shipper.[10] But if the delay results from its own negligence, the carrier cannot limit its liability for loss arising therefrom in any event.[11]

And where goods are delayed in the course of transit, the carrier must use reasonable care to protect them from injury.[12]

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(7) Missouri Pacific R. Co. vs. Harris, 1 White & W. Civ. Cas. Ct. App. secs. 1257 and 1262.

(8) Byers vs. Southern Express Co., 81 S. E. 741, 165 N. C. 542.

(9) Leavens vs. American Express Co., 85 Atl. 557.

(10) American & English Encyl. of Law, tit. "Carriers of Goods," subtit. "Limitation of Liability."

(11) Nicholas, 9 Am. & Eng. R. Cas. 103; Leonard vs. Chicago, etc., R. Co., 50 Mo. App. 293; Branch vs. Wilmington, etc., R. Co., 88 N. Car. 573, 18 Am. & Eng. R. Cas. 621; White vs. Great Western R. Co., 2 C. B. & S. 7, 89 E. C. L. 7, 26 L. J. C. P. 158. Compare Black vs. Baxendale, 1 Exch. 410.

(12) Regan vs. Grand Trunk R. Co., 61 N. H. 579.

The question has been mooted whether a carrier is liable for a loss resulting from an act of God, or the public enemy, when such loss would not have occurred had the carrier not been guilty of a negligent delay, owing to which the goods were subjected to the operation of the forces causing the loss.

In some of the states, the rule in such cases is stated to be that the carrier is liable for the loss; the negligence of the carrier in delaying the transportation of the goods and thereby subjecting them

§ 3. Limitation Where Losses Result Through Theft.

Where losses are occasioned through theft, an exemption against such losses by "thieves or robbers" is valid, unless the theft be invited through some negligence of the carrier.[13]

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to the immediate forces which destroyed them is regarded as the proximate cause of the loss, the inevitable accident being the mere concurrent cause.

The better view, however, is that there is no liability on the part of the carrier in such cases. The carrier's negligence in causing the delay is a mere incident or condition, and is not properly a cause at all. It is a mere link in the chain of causation, and sustains only a remote connection with the final effect. In order for any act to render the actor liable for a particular injury, it must not only be shown that without such the injury would not have occurred, but, further, that such act was the immediate proximate cause of the injury and that there was no intervening efficient cause.

But when it is made to appear that the carrier, by the exercise of reasonable diligence and foresight, might have foreseen the danger to which a delay might subject the goods by reason of its causing them to come within the operation of the flood or other **vis major**, it is liable for damages resulting to the goods from such causes which the exercise of care and diligence would have prevented.—American & English Encyl. of Law, tit. "Carriers of Goods," pp. 258 to 260, and cases cited in footnotes 1 and 2 to page 259 and footnotes 1 to 3, both incl., page 260.

Berje vs. Texas & P. Ry. Co., 37 La. Ann. 68; Nelson vs. Great Northern Ry. Co., 72 P. 642, 28 Mont. 297; Condict vs. Grand Trunk Ry. Co., 54 N. Y. 500; Jennings vs. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394, affirming (1889) 52 Hun 227, 5 N. Y. Supp. 140; Parker vs. Atlantic Coast Line R. Co., 45 S. E. 658, 133 N. C. 335, 63 L. R. A. 827; St. Louis & S. F. Co. vs. Zickafoose, 135 P. 406.

[13] The Saratoga (D. C.), 20 Fed. 869.

In Taylor vs. Liverpool, etc., Steam Co., L. R. 9 Q. B. 546, 22 W. R. 752, 43 L. J. Q. B. 205, nine boxes of diamonds were shipped in one of the defendant company's steamers under a bill of lading exempting the carrier from liability for losses from the act of God, the public enemy, pirates, robbers, thieves, barratry of master or mariners, etc. One of the boxes having been stolen from the ship during the voyage, or after her arrival and before time for delivery, the shipper brought this action to recover for the loss. It did not appear whether the theft had been committed by one of the crew, or by a passenger, or by some stranger after the arrival of the steamer in port. The court held that the loss was not within the exemption, since the word "thieves" did not include one of the crew or passengers who should commit a theft.

So also in the case of De Rothschild vs. Royal Mail Steam Packet Co., 7 Exch. 734, 21 L. J. Exch. 273, the defendant company undertook to carry certain goods from Panama to London, but was not to be liable for losses caused by "pirates, robbers, fire," etc. The goods

§ 4. Limitation Where Losses Occur Through Breakage or Leakage.

A common carrier is liable for losses occurring through breakage through the negligence of his servants, even though he stipulates in his bill of lading that he will not be liable for breakage of goods in boxes.[14] And in the same state it was held that where a contract provided that the carrier should be liable for breakage of or injury to glass, or any articles of a fragile nature in any of the packages which it undertook to carry, such exemption was void as against public policy, being a contract against liability, not only for ordinary negligence, but for gross negligence.[15]

Where a common carrier enters into a special contract

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were safely carried to Southampton and there placed in a railway truck to be carried to London, but were stolen while en route to London. It was held that the loss was not within the exemption clause, stipulating against loss by robbers or dangers of the road, since the word "robbers" meant, not thieves, but robbers by violence, and "dangers of the road" meant dangers of marine roads; or, if land roads, then such damages as were immediately caused by roads, as, for example, the overturning of a carriage in a precipitous place. See also Latham vs. Stanbury, 3 Stark, 143, 14 E. C. L. 171; Latham vs. Rutley, 3 D. & R. 211, 2 B. & C. 20, 9 E. C. L. 10; Schmidt vs. Royal Mail Steamship Co., 45 L. J. Q. B. Div. 646; Burton vs. English, 12 Q. B. Div. 218; Norman & Binnington, 25 Q. B. Div. 475.

But in another case, where a box of specie had been shipped under a special contract which provided that the carrier should not be liable for losses from "theft on land or afloat, barratry of master or mariners, or any act, neglect or default of the pilot, master, servants, or agents of the company," and in the course of the voyage a large amount of specie was stolen out of the box, the evidence pointing to the ship's purser as the guilty party, the court held that, admitting the purser to have stolen the specie, the loss was within the provision exempting the company from liability, since, even if the purser be considered not a "mariner," the loss was within the exemption against liability for "theft on land or afloat." Spinetti vs. Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579, reversing 14 Hun (N. Y.) 100. See also American Ins. Co. vs. Bryan, 1 Hill (N. Y.) 25, 26 Wend. (N. Y.) 563, 37 Am. Dec. 278; Atlantic Ins. Co. vs. Storrow, 5 Paige (N. Y.) 285.—American & English Encyl. of Law, tit. "Carriers of Goods," footnote 1 to page 336.

(14) Reno vs. Hogan, 51 Ky. (12 D. Mon.) 63, 54 Am. Dec. 513.

(15) Adams Express Co. vs. Spalding, 10 Ky. Law Rep. 540.

that he will not be liable for breakage or leakage, he is only relieved from his liability as insurer, leaving him responsible for ordinary negligence as any other bailee for hire.[16]

§ 5. Limitation Where Losses Occur Through Fire.

The law permits a common carrier to stipulate for exemption from liability for losses occurring through fire, but in doing so, he cannot escape his obligation of ordinary diligence.[17]

But an exemption from fire liability inserted in a bill of lading does not except the carrier in all cases of destruction by fire. As the rule was stated in Woodward vs. Illinois Central R. Co.,[18] the carrier is "bound to use reasonable care and diligence, such as an ordinarily prudent man would exercise over his own property."[19]

In **Southern Pacific R. Co.** vs. **Weatherford Cotton Mills,** 134 S. W. 778, the issue in which arose under the provisions of the Carmack Amendment to the Act to Regulate Commerce, the court declared a stipulation of exemption in the bill of lading of an interstate shipment from liability for loss or damage to goods occasioned by fire

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(16) Missouri Valley R. Co. vs. Caldwell, 8 Kan. 244.

(17) Hutchinson Carriers, 3d ed., Vol. I, chap. VII, sec. 420, p. 440, cases cited in footnote 30.

(18) Woodward vs. Illinois Central R. Co., Fed. Cas. No. 18006 (1 Biss. 403); (1864) Id., Fed. No. 18007 (1 Biss. 447).

(19) P. Garvin, Inc., vs. New York Cent. & H. R. R. Co., 96 N. E. 717, 210 Mass. 275; Michigan So. & N. R. Co. vs. Heaton, 37 Ind. 448, 10 Am. Rep. 89; Ashley vs. Central of Ga. Ry. Co., 68 S. E. 56, 7 Ga. App. 711; Mann vs. Pere Marquette R. Co., 97 N. W. 721, 10 Det. Leg. N. 764, 135 Mich. 210; Central of Ga. Ry. Co. vs. Patterson, 68 So. 513; Houston & T. C. R. Co. vs. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; Reid vs. Evansville & T. H. R. Co., 35 N. E. 703, 10 Ind. App. 385, 53 Am. St. Rep. 391; Muser vs. American Exp. Co. (C. C.), 1 Fed. 382; Bank of Kentucky vs. Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; Lawrence vs. New York, P. & B. Ry. Co., 36 Conn. 63; McFadden vs. Railway Co., 92 Mo. 343; Liverpool, etc., Ins. Co. vs. McNeill, 89 Fed. 131, 32 C. C. A. 173.

to be without effect, if the fire was due to the negligence of any carrier handling the goods. The stipulation would also have been invalid if the initial carrier had attempted to apply it to loss occurring on its own line, the decision of the court in the **Weatherford Case, supra,** being to the effect that such an exemption would be invalid under the Carmack Amendment where the loss occurred on the line of the connecting carrier.

§ 6. Limitation of Liability to that of Forwarder.

Bills of lading frequently contain stipulations limiting the liability of the carrier to that of a forwarder. Such exceptions are sometimes qualified to the effect that the limitation shall exclude all losses arising from any cause whatever unless they be proved to have occurred through fraud or gross negligence.[20]

It was held in Christenson vs. American Exp. Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122, that an express company is not released from liability for loss of a package which was destroyed by the sinking of a boat through the negligence of those in charge of the boat, where a bill of lading exempted the carrier from perils of navigation and provided the carrier should only be liable as a forwarder.[21]

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[20] Orndorff vs. Adams Exp. Co., 66 Ky. (Bush) 194, 96 Am. Dec. 207, holding, in an action against the carrier for the loss of goods where it appeared that the bill of lading provided that the carrier should not be liable, except as a forwarder, for any loss or damage arising from any cause whatever, unless it be proved to have occurred from fraud or gross negligence, that the defendant was not exempt from liability for a loss caused by ordinary neglect.

[21] **Forwarding merchant, or forwarder.** One who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, having no concern in the vessels or wagons by which they are transported, and no interest in the freight, and not being deemed a common carrier, but a mere warehouseman and agent. Story, Bailm., secs. 502, 509; Black's Law Dict., p. 513, tit. "Forwarding Merchant, or Forwarder."

§ 7. Limitation of Liability for Acts of Employees or Agents.

Any contract entered into between a common carrier and his customer wherein the carrier stipulates freedom from liability for losses occurring through the gross and culpable negligence of its servants and employees, is unreasonable and void. It was early held that a general ship is a common carrier and an exception in her bills of lading against loss "by any act, neglect, or default of the master or mariners," was void.[22] The rule is well settled that a common carrier, by special contract or otherwise, cannot limit his liability for losses occurring through the negligence of his servants or agents, even though, in the absence of statute, it may limit its liability as an insurer.[23]

A common carrier cannot evade the effect of the principle, everywhere apparent in its dealings with its patrons, that common carriers are quasi-public institutions, owing a duty to the public which they cannot avoid by private contract; for public policy forbids that they should escape this obligation.[24] Nor is it sound in principle that the extension of the right of the carrier to contract for complete exemption from liability, is founded upon the right of men to make their own agreements.[25]

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[22] The Saratoga (D. C.), 20 Fed. 869.

[23] In the absence of statute, a carrier may, by special contract, limit his liability as an insurer, but it cannot restrict it so as to excuse itself from the results of the negligence of his servants or agents.—Hudson vs. Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608.

[24] Little Rock, etc., R. Co. vs. Cravens, 57 Ark. 112, 55 Am. & Eng. R. Cas. 650.—"Great and valuable powers and privileges are conferred upon the carrier, and in return for them, out of regard for the general good, the law exacts that he shall promptly perform (the service) without damage to the property committed to him. He accepts for grant upon those terms, enjoys its benefit, and thereby acquires a controlling influence in the body politic, and then declines to perform the service except upon the condition that he be released from the accountability he assumes. * * * This is a plain dereliction of a public duty."

[25] "It is urged by the authorities in favor of the extension of the carrier's right to contract for a complete exemption from liability,

§ 8. Limitation of Liability for Act of Connecting Carriers.

It is the well-settled rule of both the English and American courts that the initial carrier in a route of carriage embracing the lines of two or more carriers may, wherever the common law prevails, by clear and express provisions in the shipping contract, exempt itself from liability for losses occurring beyond the end of its line. In fact, such a right in the initial carrier is unquestioned, but the manner in which such exception is expressed in the shipping contract, many times gives rise to difficulty in determining its sufficiency. The rule of the English courts is less liberal in its construction than that of the American courts, the latter rule requiring a definite and certain agreement in order to hold the initial carrier liable for losses occurring on the lines of its connecting carriers. In this country, by joint arrangement between carriers operating connecting lines, a partnership relation may arise by which each carrier in the route becomes liable for breach of duty of

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that men must be permitted to make their own agreement, and that it is not a matter of public concern on what terms an individual consents to have his goods carried for him.

"But this argument, however plausible it may be, is unsound, and has never received the sanction of the courts outside of one or two jurisdictions; it overlooks the inequality of the respective positions of the carrier and the shipper, and the advantage and quasi-monopoly enjoyed by the former.

"It leaves out of consideration the principle, now of universal recognition, that railroad and express companies are quasi-public institutions, owing a duty to the public which they cannot avoid by private contract and which public policy forbids they should escape."

[26] Cincinnati, etc., R. Co. vs. Spratt, 2 Duv. (Ky.) 4; Baltimore, etc., R. Co. vs. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Block vs. Fitchburg R. Co., 139 Mass. 308, 1 N. E. 348; Hill Mfg. Co. vs. Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Alabama, etc., R. Co. vs. Lamkin (Miss. 1901), 30 So. 47; Robert C. White Live Stock Commission Co. vs. Chicago, etc., R. Co., 87 Mo. App. 330; Shewalter vs. Missouri Pac. R. Co., 84 Mo. App. 589; Wyman vs. Chicago, etc., R. Co., 4 Mo. App. 35; Barter vs. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Nashua Lock Co. vs. Worcester, etc., R. Co., 48 N. H. 339, 2 Am. Rep. 242; Swift vs. Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583;

any one of the carriers participating.[26] See also authorities cited in footnote.[27]

The common law, it must be remembered, looks with disfavor upon any contractual or other attempt by the carrier to limit its common carrier liability, but at common law the initial carrier is not liable for loss or injury to the goods after it has delivered them to the connecting carriers, unless the initial carrier has by definite and certain stipulation or agreement assumed liability beyond the end of its own line. So, connecting carriers cannot make arrangements with each other which will preclude either one of them from serving the public generally with reference to the transportation of goods as a common carrier.[28] And mere joint traffic arrangements, accom-

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Berg vs. Narragansett Steamship Co., 5 Daly (N. Y.) 394; Wing vs. New York, etc., R. Co., 1 Hilt. (N. Y.) 235; Rocky Mount Mills vs. Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682; Phillips vs. North Carolina R. Co., 78 N. C. 294; Harris vs. Cheshire R. Co. (R. I. 1889), 16 Atl. 512; Bradford vs. South Carolina R. Co., 7 Rich. (S. C.) 201, 62 Am. Dec. 411; Gulf, etc., R. Co. vs. Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; Missouri, etc., R. Co. vs. Wells, 24 Tex. Civ. App. 304, 58 S. W. 842; Goldstein vs. Sherman, etc., R. Co. (Tex. Civ. App. 1901), 61 S. W. 336; Galveston, etc., R. Co. vs. Houston (Tex. Civ. App. 1897), 40 S. W. 842; Houston, etc., R. Co. vs. McFadden (Tex. Civ. App. 1897), 40 S. W. 216. Atchison, etc., R. Co. vs. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286; Richardson vs. The Charles P. Chouteau, 37 Fed. 532; Harp vs. The Grand Era, 1 Woods (U. S.) 184, 11 Fed. Cas. No. 6084.

[27] St. Louis Ins. Co. vs. St. Louis, etc., R. R. Co., 104 U. S. 146; E. & C. R. R. Co. vs. Androscoggin Mills, 89 U. S. 594; Muschamp vs. Lancaster & Preston Ry., 8 M. & W. 421; Ortt vs. M. & St. L. Ry. Co., 36 Minn. 396; O. & L. C. R. R. Co. vs. Pratt, 89 U. S. 123; I. C. R. R. Co. vs. Johnson, 34 Ill. 389; E. Tenn., etc., Ry. Co. vs. Rogers, 53 Tenn. 143; Converse vs. Norwich of New York Transp. Co., 33 Conn. 166; Rickerson Roller-Mill Co. vs. G. R. & I. R. R. Co., 67 Mich. 110; Collins vs. The Railway, 11 Exch. 790; Babcock vs. L. S. & M. S. R. R. Co., 49 N. Y. 491; Irvin vs. M. C. & St. L. Ry. Co., 92 Ill. 103; Prendegast vs. Adams Express Co., 101 Mass. 120; C., H. & D. R. R. vs. Spratt, 2 Duvall 4; Gass vs. New York, etc., R. R. Co., 99 Mass. 220; Bancroft vs. Merchants' Despatch Transp. Co., 47 Iowa 262.

[28] Seasongood, etc., Co. vs. Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270; Stewart vs. Erie, etc.,

panied by agreed divisions of freight and charges, do not in themselves constitute the partnership relation of connecting carriers necessary to impart full liability to each for the acts of the other.[29]

But it was held in Illinois that where each carrier acts as agent for other connecting carriers in the same line, each is responsible for the acts of its own employees and agents.[30] The American rule is stated in "Cyc." as follows:

> "The liability of the first carrier, in the absence of any contract to the contrary, terminates when he transports the goods to the end of his line of carriage and delivers them to a connecting carrier to be taken to their destination. But whatever may be the presumption, the right of the carrier is fully recognized

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Transp. Co., 17 Minn. 372; Wiggins Ferry Co. vs. Chicago, etc., R. Co., 5 Mo. App. 347; Houston, etc., R. Co. vs. Lone Star Salt Co., 19 Tex. Civ. App. 676, 48 S. W. 619.

(29) St. Louis, etc., R. Co. vs. Neel, 56 Ark. 279, 19 S. W. 963; Hot Springs R. Co. vs. Trippe, 42 Ark. 465, 48 Am. Rep. 65; Converse vs. Norwich, etc., Transp. Co., 33 Conn. 166; Irvin vs. Nashville, etc., R. Co., 92 Ill. 103, Am. Rep. 116; Chicago, etc., R. Co. vs. Northern Line Packet Co., 70 Ill. 217; Aigen vs. Boston, etc., R. Co., 132 Mass. 423; Gass vs. New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742; Darling vs. Boston, etc., R. Corp., 11 Allen (Mass.) 295; Robert C. White Live Stock Commission Co. vs. Chicago, etc., R. Co., 87 Mo. App. 330; Fremont, etc., R. Co. vs. Waters, 50 Neb. 592, 70 N. W. 225; Hunt vs. New York, etc., R. Co., 1 Hilt. (N. Y.) 228; Post vs. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481; Galveston, etc., R. Co. vs. Johnson (Tex. Civ. App. 1896), 37 S. W. 243; Deming vs. Norfolk, etc., R. Co., 21 Fed. 25; Citizens' Ins. Co. vs. Lountz Line, 10 Fed. 768; St. Louis Ins. Co. vs. St. Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679.

The joint arrangement between the connecting lines may be such as to make each the agent for the other in undertaking the continuous transportation of goods. On the other hand, where the initial carrier undertakes the entire transportation, the connecting carriers through whose hands the goods pass in the performance of the contract are agents of the initial carrier in the performance of its contract, and a suit for breach of the contract should be brought against the carrier with whom the contract is made.—6 "Cyc," tit. "Carriers," footnotes 82 and 83.

(30) Illinois Cent. R. Co. vs. Foulks, 92 Ill. App. 391.

to limit his liability by contract, and even by usage, to his own line."[31]

§ 9. Effect of Through Bill of Lading.

There is variance between the clear import of the provisions of the Carmack Amendment to the Act to Regulate Commerce and the common law rules governing implied contract for through transportation via a route constituted of two or more carriers. It is, of course, true that from the circumstances of the transportation, contract for through transportation made by the initial carrier may be implied, but at common law, the mere fact that arrangements for through transportation exist and that a through

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[31] 6 Cyc., tit. "Carriers," page 480, and cases cited in footnotes 87 and 88.

"There has been much discussion by the courts of the question whether, if a carrier receives goods marked to a destination beyond his usual line of transportation, so that for the final delivery of the goods at their destination transportation by a connecting carrier will be necessary, the shipper, who has actual or presumptive knowledge of the facts, is entitled to rely on the acceptance by the first carrier as constituting a contract to deliver the goods at their destination, employing the intermediate carrier as agent for that purpose, or whether, on the other hand, the contract implied is that the first carrier will transport the goods to the end of his usual line, and as agent of the shipper deliver them to an intermediate carrier, who thereupon becomes carrier of the shipper to complete the transportation. On the determination of this question will depend the solution of the further question whether the first carrier, after transporting the goods to the end of his line and delivering them to a connecting carrrier, is absolved from liability, or whether his liability as carrier continues until the connecting carrier completes the transportation by delivering goods at their destination. These questions, which seem to have assumed practical form only since the introduction of the transportation by railroad, the first decided by the English courts on the theory that the shipper had a right to assume an undertaking by the carrier, in the absence of any express agreement to the contrary, to deliver the goods at their ultimate destination, and according to what is called the English rule the carrier receiving the goods becomes liable as carrier for the entire transportation. A few American courts have given theoretical sanction to the English rule, but a contrary conclusion has been reached in this country on reasoning which seems satisfactory and more in harmony with the conditions surrounding transportation by rail."—6 "Cyc.," tit. "Carriers," pages 479 and 480, and cases cited in footnotes 84 to 86, both incl.

rate has been fixed, does not necessarily effect a through contract of carriage.[32]

But where the initial carrier issues to the shipper a through bill of lading or receipt for the transportation of the goods to their destination beyond the terminus of the line of the initial carrier, the contracting carrier binds itself to deliver the goods at the designated destination and is liable for losses or injury to the goods occurring on the line of a connecting carrier over whose line any part of the transportation is performed. This is the rule in the states of California, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, New York, Ohio, South Carolina, Texas, Vermont, and Wisconsin. Many leading cases decided by the United States courts uphold this rule.[33]

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[32] Philadelphia, etc., R. Co. vs. Ramsey, 89 Pa. St. 474; Page vs. Chicago, etc., R. Co., 7 S. D. 297, 64 N. W. 137; Michigan Cent. R. Co. vs. Myrick, 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325; Colfax Mountain Fruit Co. vs. Southern Pac. Co. (Cal. 1896), 46 Pac. 668; Converse vs. Norwich, etc., Transp. Co., 33 Conn. 166; Baugh vs. McDaniel, 42 Ga. 641; Illinois Cent. R. Co. vs. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Hill vs. Burlington, etc., R. Co., 60 Iowa 196, 14 N. W. 249; Taylor vs. Maine Cent. R. Co., 87 Me. 299, 32 Atl. 905; Hill Mfg. Co. vs. Boston, etc., R. Co., 16 Mich. 79, 93 Am. Rep. 202; McMillan vs. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Wehman vs. Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546; Illinois Cent. R. Co. vs. Kerr, 68 Miss. 14, 8 So. 330; Goldsmith vs. Chicago, etc., R. Co., 12 Mo. App. 479; Missouri Pac. R. Co. vs. Crowell Lumber, etc., Co., 51 Neb. 293, 70 N. W. 964; Clyde vs. Hubbard, 88 Pa. St. 358; Piedmont Mfg. Co. vs. Columbia, etc., R. Co., 19 S. C. 353; Gulf, etc., R. Co. vs. Griffith (Tex. Civ. App. 1893), 24 S. W. 362; St. Louis Ins. Co. vs. St. Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679; Cincinnati, etc., R. Co. vs. Fairbanks, 90 Fed. 467, 33 C. C. A. 611; The Thomas McManus, 24 Fed. 509; Stewart vs. Terre Haute, etc., R. Co., 1 McCrary (U. S.) 312, 3 Fed. 768.

[33] Colfax Mountain Fruit Co. vs. Southern Pac. Co. (Cal. 1896), 46 Pac. 668; Central, etc., R. Co. vs. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Falvey vs. Georgia R. Co., 76 Ga. 597, 2 Am. St. Rep. 58; Cohen vs. Southern Express Co., 45 Ga. 148; Southern Express Co. vs. Shea, 38 Ga. 519; Mosher vs. Southern Express Co., 38 Ga. 37; Toledo, etc., R. Co. vs. Lockhart, 71 Ill. 627; Toledo, etc., R. Co. vs. Merriman, 52 Ill. 123, 4 Am. Rep. 590; Wabash R. Co. vs.

If the bill of lading contains merely the designation of the destination on a connecting or subsequent carrier's line, and if other terms and conditions indicate a limitation of liability to the end of the initial carrier's line, it will not be deemed a contract of through transportation.[34]

In **Beard** vs. **St. Louis, etc., R. Co.,** 79 Iowa 527, 44 N. W. 803, it was held that the second carrier may, by contract, obligate himself to transport goods to destination on delivery to him by the first carrier, although such

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Harris, 55 Ill. App. 159; Fortier vs. Pennsylvania Co., 18 Ill. App. 260; St. Louis, etc., R. Co. vs. Piper, 13 Kan. 505; Ireland vs. Mobile, etc., R. Co., 105 Ky. 400, 20 Ky. L. Rep. 1586, 49 S. W. 188; Bryan vs. Memphis, etc., R. Co., 11 Bush (Ky.) 597; Louisville, etc., Mail Co. vs. Levey, 11 Ky. L. Rep. 286; Hirsch vs. Leathers, 23 La. Ann. 50; Perkins vs. Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507; Crawford vs. Southern R. Assoc., 51 Miss. 222, 24 Am. Rep. 626; Davis vs. Jacksonville Southeastern Line, 126 Mo. 346; Eckles vs. Missouri Pac. R. Co., 72 Mo. App. 296; Condict vs. Grand Trunk R. Co., 54 N. Y. 500; Root vs. Great Western R. Co., 45 N. Y. 524; Burtis vs. Buffalo, etc., R. Co., 24 N. Y. 269; King vs. Macon, etc, R. Co., 62 Barb. (N. Y.) 160; Berg vs. Narragansett Steamship Co., 5 Daly (N. Y.) 394; Mallory vs. Burrett, 1 E. D. Smith (N. Y.) 234; Fatman vs. Cincinnati, etc., R. Co., 2 Disn. (Ohio) 248; Kyle vs. Laurens R. Co., 10 Rich. (S. C.) 382, 70 Am. Dec. 231; Gulf, etc., R. Co. vs. Insurance Co. of North America (Tex. Civ. App. 1894), 28 S. W. 237; Newell vs. Smith, 49 Vt. 255; Cutts vs. Brainerd, 42 Vt. 566, 1 Am. Rep. 353; Morse vs. Brainard, 41 Vt. 550; Mann vs. Birchard, 40 Vt. 326, 94 Am. Sec. 398; Hansen vs. Flint, etc., R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791; Missouri, etc., R. Co. vs. McCann, 174 U. S. 580, 19 S. Ct. 755; 43 L. Ed. 1093; Ohio, etc., R. Co. vs. McCarthy, 96 U. S. 258, 24 L. Ed. 693; Evansville, etc., R. Co. vs. Androscoggin Mills, 22 Wall. (U. S.) 594, 22 L. Ed. 724; Ogdensburg, etc., R. Co. vs. Pratt, 22 Wall. (U. S.) 123, 22 L. Ed. 827; St. John vs. Southern Express Co., 1 Woods (U. S.) 612, 21 Fed. Case No. 12228, 10 Am. L. Rep. N. S. 777.

(34) Naugatuck R. Co. vs. Waterbury Button Co., 24 Conn. 468; Elmore vs. Naugatuck R. Co., 23 Conn. 457, 63 Am. Dec. 143; Pendergast vs. Adams Express Co., 101 Mass. 120; Rickerson Roller Mill Co. vs. Grand Rapids, etc., R. Co., 67 Mich. 110, 34 N. W. 269; Ortt vs. Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519; Crawford vs. Southern R. Assoc., 51 Miss. 222, 24 Am. Rep. 626; Ricketts vs. Baltimore, etc., R. Co., 59 N. Y. 637; Babcock vs. Lake Shore, etc., R. Co., N. Y. 491; Wright vs. Boughton, 22 Barb. (N. Y.) 561; Phillips vs. North Carolina R. Co., 78 N. C. 294; Hadd vs. U. S., etc., Express Co., 52 Vt. 335, 36 Am. Rep. 757; Parmelee vs. Western Transp. Co., 26 Wis. 439; Detroit, etc., R. Co. vs. Farmers', etc., Bank, 20 Wis. 122; Myrick vs. Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 323; St. Louis Ins. Co. vs. St. Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679.

transportation involved the employment of a subsequent carrier, and in such case suit for breach of the through transportation contract would be brought against such second carriers.[35]

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[35] Missouri Pacific R. Co. vs. Twiss, 25 Neb. 267, 33 N. W. 76, 37 Am. St. Rep. 437; Monell vs. Northern Cent. R. Co., 67 Barb. (N. Y.) 531.

"**Liability of First Carrier Under American Rule.—a. Duty to deliver to connecting carrier.** A carrier who accepts goods for a destination beyond his line thereby binds himself to make delivery to a connecting carrier. And he must notify the connecting carrier of any facts with reference to the destination of the goods, the method of transportation, etc., which are essential to enable the connecting carrier to properly receive and transport.

"b. **Liability in connection with delivery.** Until delivery is made to the connecting carrier the first carrier remains liable as carrier for the goods. The first carrier may, by improperly dealing with the goods, render himself liable to the shipper, even though the actual loss resulting is not apparent until the goods are in the second carrier's hands. Thus, if by delay in the delivery to the connecting carrier of perishable goods their loss is caused in the hands of the second carrier, the first carrier will be liable. While holding the goods for delivery to the second carrier the first carrier is not a warehouseman merely, but is subject to the full liability of common carrier. But as the duty of the first carrier is to deliver to the second carrier, and his liability is to terminate when such delivery is made, he terminates his common law liability as carrier by making proper effort to deliver to the connecting carrier, and having done so, he may, on the refusal of the connecting carrier to receive the goods, then store them and become liable as warehouseman only. Where goods are thus held as to failure or refusal of the connecting carrier to receive them, it is the duty of the initial carrier to at once notify the shipper or consignee, as the case may be.

"c. **First carrier as forwarder.** One may be a mere forwarder, that is, an agent charged with the duty of procuring transportation for goods, without becoming a carrier, and some courts have chosen to speak of the duty of the initial carrier to the owner with reference to sending the goods on by a connecting carrier as that of forwarder only, involving, therefore, liability for negligence rather than full carrier liability. But regardless of this distinction it is evident that with reference to securing transportation for the goods by the connecting carrier, the first carrier is liable only for negligence. As forwarder, so called, it is the duty of the first carrier to use reasonable care in selecting the proper connecting carrier. If the shipper designates, however, the lines over which the goods are to be forwarded, the first carrier will be liable for any loss or injury resulting from a failure to comply with such direction. If instructions to the connecting carrier are necessary to enable him to carry out the transportation in accordance with the contract with the first carrier, it is the duty of the first carrier to give such instructions, and he will be liable for loss resulting from failure to do so. If there is unnecessary delay

in making delivery to the second carrier the first carrier will be liable therefor.

"d. **What constitutes sufficient delivery to connecting carrier.** To relieve the first carrier from further liability and charge the second carrier, it is necessary that the goods be completely delivered by the first carrier and accepted by the second. But usage or contract as between the two carriers may control as to when the goods are to be deemed to have been thus completely delivered and accepted.

"e. **Delay.** If the first carrier has undertaken to carry the goods to their destination or connecting line, he will be liable for delay on such connecting line to the same extent as on his own line. But if by law or contract his liability is limited to his own line, he will not be responsible for delays on a connecting line."—6 "Cyc," pages 483 to 486, and footnotes 94 to 12, both incl.

"Duties and liabilities of second carrier.—a. **To owner of goods.** Until the goods are accepted by the second carrier he does not become liable to the owner, but if the goods are tendered in such manner that the second carrier is under obligation to receive them, he will be liable as any other carrier for refusing to do so. After the goods are received by the second carrier, his liability is that of common carrier of goods. The second carrier is not chargeable, however, with damaged condition of the goods not apparent when they are accepted by him. The liability of the second carrier is not under the contract made to the first carrier but upon the contract, express or implied, under which the second carrier has accepted the goods for transportation. Each carrier, under the American rule, is liable to the owner of the goods for injury thereto in course of transportation over his line, and each is liable for delay on his own line.

"b. **To carrier from whom goods are received.** If through any fault on the part of the second carrier liability for loss or injury to the goods is thrown upon the first carrier, the second carrier is responsible to the first, who has been compelled to answer for the injury. Where cars of one carrier are received by another, containing goods for transportation, the second carrier is a common carrier of the cars as well as the goods, and for the cars is responsible to the first carrier."—6 "Cyc," tit. "Carriers," pages 487 and 488, and cases cited in footnotes 13 to 21, both incl.

"Liability of last carrier. The liability of the last successive carrier as to making delivery is not, in general, different from that of a carrier who completes the transportation on his own line. If he delivers to the wrong person, even by reason of negligent direction of a preceding carrier for whose acts the shipper is not responsible, he must answer to the shipper for the loss of goods."—6 "Cyc," tit. "Carriers," page 488, and cases cited in footnotes 22 to 25, both incl.

"Limitations of liability. The conflict in the authorities as to what are the relations between the shipper and the successive carrier makes it difficult to lay down general propositions as to whether succeeding carriers are entitled to the lawful exemptions from liability contracted for by the first carrier. If the first carrier is the agent of the shipper for the purpose of procuring transportation over connecting lines, then a contract for limitation of liability made between the first and second carriers on delivery of the goods to the latter will be binding on the shipper. By express stipulation in the contract with the first carrier the benefit of limitations contained in that contract may inure to subsequent carriers. The weight of authority

seems to support the proposition that unless the contract for transportation by the first carrier is limited by its terms to that carrier, it is to be deemed a contract regulating the entire transportation, and connecting carriers are entitled to the benefit of limitations contained therein. Especially is this true where the bill of lading provides for an entire compensation for the through transportation. But if the contract with the first carrier apparently relates to his liability only, as, for instance, where it is stipulated that his liability shall not extend beyond his own line, the connecting carrier is not entitled to the benefits thereof. Especially is this true where there is no provision in the contract for a through rate. It has indeed been held with much reason that unless the contract expressly refers to succeeding carriers it is not available to them as a defense, inasmuch as the succeeding carrier is not a party to such contract. As, according to the American rule the first carrier is **prima facie** liable only with reference to the transportation over his own line a contract for through transportation by which the liability of the first carrier is limited to his own line is valid, even in states where limitation of liability is prohibited by statute; and liability beyond the receiving carrier's line being the result of contract, the carrier may impose on the assumption of such contract relation any limitation which he sees fit."—6 "Cyc," tit. "Carriers," pages 489 and 490, and cases cited in footnotes 26 to 35, both incl.

CHAPTER IX.

DELIVERY BY CARRIER.

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§ 1. When Liability Ends.

The common carrier's liability ends with the delivery of the goods to the designated consignee or owner, or when its character as warehouseman commences. In other words, the liability of the common carrier ends with the completion of the transportation and a delivery or the deposit of the goods in a reasonably safe warehouse, after the consignee has had reasonable notice and time in which to call for the goods, accept delivery and remove them.[1] What constitutes delivery is largely dependent upon the facts in each case.

Thus, it was held in **Chicago, etc., R. Co.** vs. **Warren,** 16 Ill. 502, 63 Am. Dec. 317, that the carrier's liability as such does not end or change to that of warehouseman by the mere deposit of the goods upon the usual dock of the steamer or depot of a railroad. There must be such an actual delivery as satisfies and fulfills the contract for carriage or delivery to the owner or consignee. The carrier's liability cannot end until that of the owner, consignee, or warehouseman begins; and it can make no difference with the carrier that in discharging his liability as such, he assumes a new relation of storer. Merely reaching the end of the voyage and delivering the goods out of the vehicle in which they are carried will not fulfill the one duty nor create the other. There must be an actual or legal delivery, either to the consignee or to the

(1) Stone vs. Waitt, 31 Me. 409, 62 Am. Dec. 621; Michigan Southern, etc., R. Co. vs. Day, 20 Ill. 375, 71 Am. Dec. 278; DeMott vs. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523.

warehouseman; and the proof of either rests upon the carrier.[2]

§ 2. Place of Delivery.

The mode or place of delivery of goods by a railroad common carrier may be established by usage, and such usage may affect the consignee's right of notice of arrival of the goods. Well known and established usage at the point of delivery, affecting the mode and place of delivery, may excuse the carrier from strict compliance with the legal requirements pertaining to delivery.

In **Cahn** vs. **Michigan Cent. R. Co.,** 71 Ill. 96, a custom of a railway company to deliver goods at the consignee's place of business was not established by the fact that the company delivered goods arriving at its depot to a carter, to be by him delivered, only when the consignee did not furnish his own teams or give directions to the contrary; the company not being interested in the cartage of the goods.

In North Carolina, in **Homesly** vs. **Elias,** 66 No. Car. 330, where there are two stations in one town for the reception and delivery of freight by a railroad company, the usage of the place may be shown to aid the jury in determining at which one freight addressed to the town generally ought to have been delivered.

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(2) "In the absence of special contract or custom the duty of a common carrier of goods does not end upon the arrival of the goods at the place of destination, but the carrier must deliver them to the consignee, and when the contract of carriage contemplates delivery of the goods upon the carrier's premises at the terminus of the route, and no time is stipulated for the arrival of the goods or for their delivery, the duty of making delivery involves either the allowance to the consignee of a reasonable time within which to make inquiries respecting their arrival, or else the duty on the part of the carrier of giving notice of arrival to the consignee; and in either case the allowance to the consignee of a reasonable time and opportunity after notice of the arrival of the goods to take them away."—Burr

Where the consignee is receiver of carload freight, and owns his own sidetrack, delivery is complete when the car is set for unloading at the usual and customary place for doing this on such sidetrack.[3]

The goods or other property transported must, in order to constitute a delivery by the carrier, be so situated that the consignee may come and take them away if he chooses; if the property is, for any reason, beyond his reach, the carrier's liability as such remains, notwithstanding what else may have been done, unless a special usage can be shown.[3a]

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vs. Express Co., 71 N. J. L. 263, 58 Atl. Rep. 609; Hutchinson on Carriers, 3d ed., Vol. I, chap. IX, sec. 708, pp. 791 and 792, footnote 16.

(3) Lewis vs. N. Y., O. & W. Ry. Co., 210 N. Y. 429; Anchor Mill Co. vs. Burlington & Sioux Falls Ry. Co., 102 Iowa 262; Lyons vs. N. Y. C. & H. Ry. Co., 119 N. Y. Supp. 703; Chicago, etc., Ry. Co. vs. Kelm, 121 Minn. 343.

See also Moore on Carriers, 2d ed., Vol. I, p. 241.

It has been held that under an order-notify shipment it was not the duty of the carrier to place the car on the delivery track until the consignee was prepared, by the presentation of the bill of lading, to receive the contents of the car.—Lyons vs. N. Y. C. & H. Ry. Co., 119 N. Y. Supp. 703.

(3a) Hungerford vs. Winnebago Tug Boat, etc., Co., 33 Wis. 303. In this case it appeared that the defendant carrier had agreed to transport a raft of logs to a certain point, and that at the time of the alleged delivery they were tied up in the river beyond the owner's reach and in the middle of a large fleet of logs. It was held that in an action against the carrier it was error to charge that the delivery was good if the logs were tied up securely at the place of destination, and notice thereof given to the owner, and it was likewise error to refuse to charge that as long as the logs remained in the middle of the fleet and inaccessible to the owner they were in the carrier's possession. Hungerford vs. Winnebago Tug Boat, etc., Co., 33 Wis. 303.

"So the carrier must furnish to the consignee reasonable opportunities and facilities for procuring the goods which are to be delivered to him. This duty includes, of course, reasonable access to the depot, station or warehouse, and reasonable opportunity and facilities for getting away the goods. So if the consignee is bound to unload the goods himself from the car, it is the duty of the carrier to place the car where it can be unloaded with a reasonable degree of convenience, and to furnish the consignee with safe and proper facilities for the purpose. And if the goods consist of live stock, such as cattle, it is the duty of the carrier to provide inclosed lots

"Where a carrier transports bulky freight, in carload lots, to its destination, and, to enable the consignee to unload it conveniently, places the car upon a track designated by the consignee for that purpose, or if he has made no such designation, upon a track proper for that purpose, and he has notice thereof, it has been held by several courts that the carrier has performed the last act required by its duty to the consignee, that the delivery is complete, and that the carrier's liability as carrier has terminated."[4]

§ 3. Time of Delivery.

A common carrier at common law is bound to deliver goods in completion of his contract of carriage within a

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or yards in or through which the stock may be delivered to the consignee."—Hutchinson Carriers, 2d ed., Vol. II, sec. 715, and cases cited in footnotes 7 to 10, both incl.

(4) S. M. & St. P. Ry. Co. vs. Kelm, 121 Minn. 343.

Pittsburgh vs. Nash, 43 Ind. 423; Pindell vs. St. Louis, 41 App. 84; Cohan vs. Missouri, 126 Mo. App. 244, 102 S. W. 1029; Chicago vs. Kendall, 72 Ill. App. 105; Gregg vs. Illinois, 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Paddock vs. Toledo & Ohio Cent. Ry., 11 Ohio C. D. 789; Independence Mills vs. Burlington, 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258, and South vs. Wood, 66 Ala. 167, 41 Am. Rep. 449; Arthur vs. St. Paul & D. R. Co., 38 Minn. 95; Riley vs. Horne, 5 Bing. 217; Nass vs. C., R. I. & P. Ry. Co., 96 Minn. 84.

In **Anchor Mill Co.** vs. **Railway Co., supra,** the language of the court as to what constitutes delivery was as follows: "What will constitute a delivery must of necessity depend upon circumstances. The railroad company, in order to deliver this wheat in bulk, certainly could not be expected to unload it. All that could be required was that it placed the car where it could be safely and conveniently unloaded by the party entitled to it, and notify him of his action. When it had done this, its duty as a common carrier ended. Independence Mills Co. vs. Burlington, C. R. & N. Ry. Co., 72 Iowa 535 (34 N. W. Rep. 320). In this case the car was put at the very place plaintiff had requested, for the purpose of being unloaded, and the plaintiff duly notified of its action. What more could the railway company do to complete the delivery?"

See also: The Union Stock Yards Co. vs. Westcott, 47 Neb. 300; Bank of Commerce vs. Bissell, 72 N. Y. 615; Joslin vs. G. T. Ry. Co., 51 Vt. 91; Libby vs. Ingles, 124 Mass. 503; North vs. The Transp. Co., 146 Mass. 315; National Bank of Chester vs. A. & C. A. L. R. R. Co., 25 S. C. 216; Seaboard Air Line vs. Phillips (Md. 1908), 70 Atl. 232.

reasonable time after they are received for transportation.[5]

It is a well-recognized principle of delivery that the common carrier shall offer the goods to the consignee at a proper time, in a proper manner and at a proper place, and, until the carrier so tenders the goods, its liability continues.[6]

Delivery must be offered at a reasonable hour of the day.[7]

The present day custom of not tendering shipments for delivery on, or computing within the time of the free unloading period, Sundays and legal holidays, is universal under the standard codes of demurrage. In this respect the common law rule has been to a great extent superseded. The rule may still be stated, however, that "in the absence of proof that delivery on Sunday, or a special or general holiday is illegal or is forbidden by the usage of the port, a carrier has a right to discharge a cargo on such a day and tender a delivery then."[8]

§ 4. Notice of Arrival of Goods.

It is the duty of a common carrier at common law to give the owner or consignee notice of the arrival or landing of his goods and of storage in a safe and suitable ware-

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(5) Philadelphia, etc., R. Co. vs. Lehman, 56 Md. 209, 6 Am. & Eng. R. Cas. 194, 40 Am. Rep. 415.

(6) Eagle vs. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

Whether goods are delivered by a carrier at a reasonable time is a question of fact. This, it was held in Columbus, etc., R. Co. vs. Flournoy, 75 Ga. 745, that "whether goods shipped are delivered by the carrier within reasonable time is a question of the fact for the jury, and depends upon the fact of each case, including the time ordinarily required for carriage between the two points, the preparations made by the carrier whether ample or not, the effort at despatch, the information given to the shipper of peculiar reasons for speedy transit and delivery, the character of the freight, and kindred circumstances."

(7) Hill vs. Humphreys, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117.

(8) American & English Encyl. of Law, tit. "Carriers of Goods," page 217, and case cited in footnote 6.

house and, until after the lapse of a reasonable time from the giving of the notice, the carrier remains liable as an insurer.[9] There is much conflict in the decision relating to the duty of the carrier to give notice to consignee, but the weight of authority is that it is its duty to notify the consignee that the goods have arrived at destination. In several of the states the matter of notice to consignee is regulated by statute and in others the courts have held that the carrier has discharged its duty as such, when it has transported the goods to the place where they were destined. Where notice is not required, the liability of the carrier after transporting the goods to destination is changed to that of warehouseman only, since in such jurisdictions it is the duty of the consignee to be on hand to receive the goods upon their arrival or landing at the regularly established delivery point of the carrier.[10]

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(9) Rowland vs. Miln, 2 Hilt. (N. Y.) 150; Sleade vs. Payne, 14 La. Ann. 457; Himphill vs. Chenie, 6 W. & S. (Pa.) 62; Warner vs. Steamship Illinois, 17 Phila. (Pa.) 549; Galloway vs. Hughes, 1 Bailey L. (S. Car.) 553; Morgan vs. Dibble, 29 Tex. 107, 94 Am. Dec. 264; Blin vs. Mayo, 10 Vt. 56, 33 Am. Dec. 175; Pickering vs. Weld, 159 Mass. 522.

There must be a landing on the proper wharf and notice to the consignee of the arrival of the goods in order to constitute a good delivery. This rule may be varied by contract or affected by well-established, reasonable and generally known custom and usage, provided such custom and usage was of such uniformity, certainty, and notoriety, as to warrant the jury in finding that it was sold to the party sought to be affected by it. Houston vs. Peters, 1 Metc. (Ky.) 558; Gashweiler vs. Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558, 25 Am. & Eng. R. Cas. 403.

See also Oskrander vs. Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; Shenk vs. Philadelphia Steamship Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541; Zinn vs. New Jersey S. S. Co., 49 N. Y. 442, 3 Am. Ry. Rep. 340, 10 Am. Rep. 402; Sherman vs. Hudson Riv. Co., 64 N. Y. 254; The Steamboat Sultana vs. Chapman, 5 Wis. 454; Goodwin, Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457; The Mill Boy, 4 McCreary (U. S.) 383; Constable vs. National S. S. Co., 154 U. S.

(10) Hutchinson Carriers, 3d ed., Vol. II, secs. 702, 708 and 711; Stevens & Russell vs. St. Louis S. W. Ry. Co. (Tex. 1915), 178 S. W. 810; Norway Plains Co. vs. B. & M. R. R., 1 Gray 263, 61 Am. Dec. 423; Mansur vs. New England Mutual Marine Ins. Co., 12 Gray 520;

The rule in New York is that the carrier is charged with the duty of notifying the consignee of the arrival of the goods.[11] It has not been until within recent years that the rule in Massachusetts has been made somewhat similar to that of New York. The cases cited in footnotes 10 and 11, and repeatedly reaffirmed by the supreme court of Massachusetts, were to the effect that the arrival of goods by railroad were so numerous, frequent and various, that it would be nearly impossible to send a special notice to each consignee of each parcel of goods or single article as it arrived, and it was therefore held that such notices would not be required.

In New York it has been consistently held that if the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier is under the duty of notifying him of the arrival of the goods and allowing him a reasonable time within which to remove them. If the consignee is absent, unknown, or cannot be found, the carrier may store the goods, and if, at the notice of the arrival of the goods to such known address of the consignee as the carrier may possess, the consignee has had a reasonable opportunity to remove them, and does not, the carrier's liability as an insurer ceases and becomes that of warehouseman only. This is also the rule under the

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Ideal Leather Goods Co. vs. Eastern S. S. Corp. (Mass. 1915), 107 N. E. 525.

See also A. E. Wood & Co. vs. M. C. R. Co. (Mich. 1915), 151 N. W. 601.

(11) Fenner vs. Railroad, 44 N. Y. 505; Hedges vs. Railroad, 49 N. Y. 223; McDonald vs. Railroad, 34 N. Y. 497; Sprague vs. Railroad, 52 N. Y. 637; Nelson vs. Railroad, 54 N. Y. 214; Thomas vs. Railroad Co., 10 Met. 472; Norway Plains Co. vs. Railroad Co., 1 Gray 263; Barron vs. Eldredge, 100 Mass. 455; Stowe vs. Railroad Co., 113 Mass. 521; Reiss vs. Hart, 118 Mass. 201.

decisions of the courts of Michigan, Minnesota, Mississippi, and Ohio.[12]

In Delaware, Maryland, Nebraska, Oregon, and Washington, by weight of authority, the rule is practically the same as the New York rule. In New Jersey, the courts make no distinction between the rules as to railroad companies and express companies, the rule in effect in that jurisdiction being a combination of the New Hampshire and New York rules.[13]

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(12) Thomas vs. Railroad Co., 10 Met. 472; Norway Plains Co. vs. Railroad Co., 1 Gray 263; Barron vs. Eldredge, 100 Mass. 455; Stowe vs. Railroad, 113 Mass. 521; Reiss vs. Hart, 118 Mass. 201.

Fenner vs. Railroad, 44 N. Y. 505; Hedges vs. Railroad, 49 N. Y. 423; McDonald vs. Railroad, 34 N. Y. 497; Sprague vs. Railroad, 52 N. Y. 637; Felton vs. Railroad, 54 N. Y. 214.

Buckley vs. Railroad Co., 18 Mich. 121; McMillan vs. Railway, 16 Mich. 79; Walters vs. Railway Co., 102 N. W. Rep. 745.

Pinney vs. Railroad Co., 19 Minn. 251; Berosia vs. Railroad Co., 18 Minn. 133.

Railroad Co. vs. Fuqua & Horton, 84 Miss. 490, 36 So. Rep. 449.

Railroad Co. vs. Hatch, 52 Ohio St. 408, 39 N. E. Rep. 1042.

Practically the same rule obtains by statute in the states of Alabama, California, Tennessee, and Texas.—Collins vs. Railroad Co., 104 Ala. 390, 16 So. Rep. 140. (Personal notice or by mail is required in cities or villages of over 2,000 inhabitants); Wilson vs. Railroad Co., 94 Cal. 166, 29 Pac. Rep. 861, 17 L. R. A. 685; Cavallaro vs. Railroad Co., 110 Cal. 348, 42 Pac. Rep. 918, 52 Am. St. Rep. 94; Jackson vs. Railroad Co., 23 Cal. 268; Railroad Co. vs. Naive, 112 Tenn. 239, 79 So. W. Rep. 124, 64 L. R. A. 443; Butler vs. Railroad Co., 8 Lea 82; Central Trust Co. vs. Railway Co., 70 Fed. 764; Railroad Co. vs. Kelly, 91 Tenn. 699, 20 S. W. Rep. 312, 30 Am. St. Rep. 902, 17 L. R. A. 691; Railroad Co. vs. Haynes, 72 Tex. 175.

(13) Hutchinson Carriers, 3d ed., Vol. II, sec. 708.—"In Delaware, Maryland, Nebraska, Oregon, and Washington, the courts have not made such a clear, definite statement of their position on this question that they can be arbitrarily placed under any one of the three preceding rules. The majority of them, however, seem to lean toward the New York rule.

"In New Jersey the court seems to recognize no distinction between the rules as to railroad companies, and express companies, and has evolved a doctrine which is a combination of the New Hampshire and New York rules;" citing McHenry vs. Railroad Co., 4 Harrison 448; Railroad Co. vs. Green, 25 Md. 72; Railroad Co. vs. Arms, 15 Neb. 69; Normile vs. Railroad & Navigation Co., 41 Ore. 177, 69 Pac. Rep. 928; Normile vs. Railroad Co., 36 Wash. 21, 77 Pac. Rep. 1087; also, "In the absence of special contract or custom the duty of a common carrier of goods does not end upon the arrival of goods at the place and destination, but the carrier must deliver them to the

The law of delivery was settled in this country in its earlier phases by the courts holding that carriers by railway were not bound to make delivery to the consignee personally. This was an exception to the rule as it existed as to water carriers, for it was presumed that the consignee would know the time of the arrival of the goods in the ordinary course. The most that the courts had ever held with respect to water carriers, was that the undertaking of a carrier by water was merely to carry from port to port, and that a delivery at the wharf, accompanied with due notice to the consignor, constituted a delivery. The mere landing of the goods upon the wharf to which they were destined did not constitute a delivery nor relieve the carrier of its liability as such for the care and safety of the goods. Whether notice of arrival was necessary, in the case of railroad-borne shipments, became subject to three different rules recognized in the decision and familiarly known as the Massachusetts, New Hampshire, and New York rules. As we have seen, the Massachusetts rule, at first, was that notice was not necessary, but later changed under the holding that "it seemed too clear for argument that unreasonable failure to deliver, or, in the case of carriage by water, unreasonable failure to notify the consignee of arrival, is a failure to carry out and perform the carrier's contract."[14]

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consignee, when the contract of carriage contemplates delivery of the goods upon the carrier's premises at the terminus of the route, and no time is stipulated for the arrival of the goods or for their delivery, the duty in making delivery involves either the allowance to the consignee a reasonable time in which to make inquiries respecting their arrival, or else the duty on the part of the carrier giving notice of arrival to the consignee; and in either case the allowance to the consignee of a reasonable time and opportunity after notice of the arrival of the goods to take them away;" citing Burr vs. Express Co., 71 N. J. L. 263, 58 Atl. Rep. 609; Railroad Co. vs. Ayers, 29 N. J. L. 393, 80 Am. Dec. 215.

(14) Ideal Leather Goods Co. vs. Eastern S. S. Corporation (Mass. 1915), 107 N. E. 525, 527; Lust, "Lost and Damage Claims," page 71,

In New Hampshire the rule was early laid down that the consignee should be allowed a reasonable time after the arrival of the goods to accept and remove them, during which the company should continue under its original liability as common carrier. "The extent of the reasonable opportunity to be afforded him for that purpose is not to be measured by any peculiar circumstances in his own condition or situation, rendering it necessary for his own convenience and accommodation that he should have a longer time or better opportunity than if he resided in the vicinity of the warehouse and was prepared with the means and facilities for taking the goods away. If his peculiar circumstances require a more extended opportunity, the goods must be considered after such reasonable time, as but for those peculiar circumstances would be deemed sufficient, to be kept by the company for his convenience and under the responsibility of depositaries and bailees for hire."[15]

"So in Massachusetts it has been stated that it seems too clear for argument that unreasonable failure to deliver, or, in the case of carriage by water, unreasonable failure to notify the consignee of arrival, is a 'failure to carry out and perform' the carrier's contract. Furthermore, it seems that the notice of arrival should be reasonably specific so as to notify the consignee of what the shipment is."

(15) "The same questions were brought before the Supreme Court of New Hampshire in the case of Moses vs. The Railroad (32 N. H. 523). It was said in this case that it would be unreasonable to require the consignee of goods, being transported by a railroad as common carrier, that he should be in attendance at the precise moment when his goods arrived, to receive or to take them, the trains of such roads, as well known, being more or less irregular in their hours of arrival. Such a requirement, it was thought, would be as unreasonable as to require of the road a delivery of the goods at a distance from its track. The arrival of the goods might be in the night or after the close of business hours, and it might be impossible for the consignee to get them away immediately; and that until he had a reasonable opportunity to remove them, the duty rested upon the carrier to take care of them for him. It thus became a matter of necessity for such companies, transacting business as common carriers, to provide depots and warehouses for the reception of freight at the stations established for its delivery; and if the goods are placed in their warehouses upon its arrival, it cannot be said to be done in any sense for the convenience or accommodation of the

Referring again to the Massachusetts rule, the duty of the railroad was to carry the goods safely to destination. Upon arrival at destination the carrier's duty was to discharge them on the platform and then and there deliver them to the consignee or person entitled to receive them, if he was on hand to take them. If the consignee or person entitled to receive the goods was not there ready to receive them, the court held it the carrier's duty to place

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consignee, nor be considered, upon any sound view, as equivalent to a delivery. The servants of the carrier still continue in charge of them. They are equally shut off from observation and the oversight of others as when in transit; and if they are lost, damaged, or purloined, he has no greater opportunity of ascertaining or proving by whose fault or negligence it was done than if such loss had occurred during the transportation. Consequently, the same reason for holding the carrier to extraordinary responsibility during the transportation of the goods exists after their arrival, at least, until the owner or consignee shall have had an opportunity to take them in charge. Supposing that the consignee, it was said, has been advised of the sending of the goods; that he has provided himself with the proper means for their receipt and removal at the earliest opportunity, and that he has also been advised of the course of business of the road, and that he will exercise reasonable diligence to be at the place of delivery as soon as practical after their arrival, it was the opinion of the court that he should be allowed a reasonable time after the arrival of the goods to accept and remove them, during which the company should continue under its original liability, as common carrier, for their preservation; and conclusion of the Supreme Court of Massachusetts was, to this extent, expressly disapproved."—Hutchinson Carriers, 3d ed., Vol. II, sec. 704.

The conclusion reached by the Supreme Court of New Hampshire has been followed in Alabama, Arkansas, Kansas, Kentucky, Louisiana, Vermont, West Virginia, and Wisconsin; Id., citing Tallahassee Falls Manufacturing Co. vs. Railroad Co., 128 Ala. 167, 29 So. Rep. 203; Boden vs. Railway Co., 41 So. Rep. 294; Alabama & Tennessee Rivers R. R. vs. Kidd, 35 Ala. 209; Mobile, etc., R. R. vs. Prewitt, 46 Ala. 6; Louisville, etc., R. Co. vs. McGuire, 79 Ala. 395; Louisville, etc., R. Co. vs. Oden, 80 Ala. 39; Railway Co. vs. Nevill, 60 Ark. 375, 30 S. W. Rep. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208; Leavenworth, etc., R. R. vs. Marys, 16 Kan. 333; Railroad Co. vs. Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. Rep. 899; Railway Co. vs. Neberger & Bro., 67 Kan. 846, 73 Pac. Rep. 57; Jeffersonville, etc., R. R. vs. Cleveland, 2 Bush. 28; Wall vs. Railroad Co., 92 Ky. 645; Miagnan vs. The Railroad, 24 La. Ann. 333; Ouimitt vs. Henshaw, 35 Vt. 604; Blumenthal vs. Brainard, 38 Vt. 402; Winslow vs. The Railroad, 42 Vt. 700; Berry vs. The Railroad Co., 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep. 781; Wood vs. Crocker, 18 Wis. 345; Lemke vs. The Railroad, 39 Wis. 449; Backhaus vs. Railway Co., 92 Wis. 393, 66 N. W. Rep. 400.

such goods in some secure and safe place as a warehouseman, and hold such goods for a reasonable time ready to be delivered when called for. The reasoning of the court in **Norway Plains Co.** vs. **B. & M. R. R.,** 1 Gray 263, was that either it was not the duty of the railroad as a common carrier to deliver the goods to the consignee or that the delivery by itself as a common carrier, to itself as a keeper for hire, was a delivery which discharged its responsibility and its extraordinary liability as a common carrier. And this was the rule and the view of the law followed by the courts of Georgia, Illinois, Indiana, Iowa, Missouri, North Carolina, Pennsylvania, and South Carolina.[16]

Notice to the consignee becomes immaterial where goods have in fact reached their destination, and on demand by the consignee, the carrier informs him that they have not yet arrived. If through such negligence of the carrier in wrongfully informing the consignee, the goods are destroyed, the carrier continues liable as a common carrier and not as a warehouseman.[17]

§ 5. Sufficiency of Notice.

Where notice to consignee is required, such notice to take the place of delivery must be a reasonable one.[18]

If a consignee has had actual notice of the arrival of freight and its readiness for delivery and does not demand

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(16) Hutchinson Carriers, 3d ed., Vol. II, sec. 702, and cases cited in footnotes 17, 18, 19, 20, 21, 22, 23 and 24.

(17) Central Trust Co. vs. Railway Co., 70 Fed. 764; Railroad Co. vs. White, 88 Ga. 805, 15 S. E. Rep. 802; Thyll vs. Railroad Co., 87 N. Y. Supp. 645, 92 App. Div. 513, **modifying** 84 N. Y. Supp. 175; Berry vs. Railroad Co., 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep. 781; Railway Co. vs. Kelly, 91 Tenn. 699, 20 S. W. Rep. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902; Railway Co. vs. Kelly, 92 Tenn. 708, 20 S. W. Rep. 314.

(18) Crawford vs. Clark, 13 Ill. (5 Peck 561); Atlantic Navigation Co. vs. Johnson, 27 N. Y. Super. Ct. (4 Rob.) 474.

it in a reasonable time thereafter, the manner of notice is immaterial.[19] But where the consignee is not present to receive verbal notice of the arrival of the goods, a notice sent through the mail is sufficient.[20]

Notice in the newspapers will not cause goods discharged on the levee to be at the consignee's risk, unless knowledge is shown to have been brought home to him.[21]

In New York, and the practice is the same in many other states, a postal card notice to the consignee by a carrier of the arrival of the goods is sufficient, especially where the consignee is aware of a local custom of giving notice in this manner.[22] The mailing of such notice, by depositing it in the post office addressed to the consignee at the point of destination, is sufficient.[23]

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(19) Southern Ry. Co. vs. W. T. Adams Mach. Co., 51 So. 779.

(20) Braunton & Robertson vs. Southern Pac. Co., 83 Pac. 265, 2 Cal. App. 173.

(21) Cohn vs. Packard, 3 La. 224, 23 Am. Dec. 453; Atlantic Nav. Co. vs. Johnson, 27 N. Y. Super. Ct. (4 Rob.) 474.

(22) Friedman vs. Metropolitan S. S. Co., 90 N. Y. Supp. 401, 45 Misc. Rep. 383.

Wood vs. Baltimore & O. R. Co., 96 N. Y. S. 184, 48 Misc. Rep. 643.—An address upon a box entrusted to its carrier read, "Wm. Wood & Co., N. Y.," while the shipping ticket read, "W. Wood." There were forty persons in the New York directory who bore the name of "W. Wood." The court held that the carrier did not fulfill its duty by mailing a notice of the arrival of the box at destination to a "W. Wood" selected by chance from the names in the directory.

(23) Normalie vs. Northern Pac. Ry. Co., 77 Pac. 1087, 36 Wash. 21, L. R. A. 271.

St. Louis, B. & M. Ry. Co. vs. Hicks, 158 S. W. 192.—A notice of the arrival of the goods is not "given" or "sent," under the provisions of the bill of lading, at the time it is posted, whether the consignee is in the same town as the agents of the carrier and known to them so that he could be directly notified.

Poythress vs. Durham & S. Ry. Co., 62 S. E. 515, 148 N. C. 391, 18 L. R. A. (N. S.) 427.—A notice of the arrival of goods, which a carrier must give a consignee to relieve itself from liability as an insurer, need not be served personally on the consignee. It is sufficient to deposit written notice in the postoffice addressed to the consignee, for such is the expressed provision of rule 1 of the corporation commission.

Constable vs. National S. S. Co., 15 U. S. 51, 14 Sup. Ct. 1062, 39 L. Ed. 903.—Where notice to consignees at the time and place of discharge of the cargo is required, it was held that the same might be given by posting on bulletin board at the custom house at a port where it is usual so to post such notices, and not to publish them in the newspapers.

Greek-American Produce Co. vs. Illinois Cent. R. Co., 58 So. 994.—The delivery of an interstate shipment in Alabama is governed by the laws of Alabama as to the subject of delivery and sufficiency of notice of delivery.

Jolly vs. Atchison, T. & S. F. Ry. Co., 131 Pac. 1057.—It was held that a telephone message and a postal card sent to the consignee on the morning the goods arrived, stating that the car would be delivered in the usual course of business, was at most a notice of intention to make delivery in the future, and that the same should have been followed by actual notice of delivery within business hours.

In L., L. & G. R. R. Co. vs. Maris, 16 Kan. 333, it was held that the liability of the common carrier continued until the expiration of a reasonable time from the arrival of the goods. The plaintiff resided at a point about 90 miles west of Independence, Kansas, which could only be reached from Independence by wagon. The carrier accepted and transported a consignment of goods to the plaintiff at Independence, which arrived on January 4th and 7th, were placed in the carrier's depot and on January 15th were destroyed by fire. Immediately upon the arrival of the goods at Independence, the carrier forwarded notice by mail to the plaintiff, which on account of disease among the horses used in the post routes, did not reach the plaintiff until January 20th. Plaintiff had entered into a special agreement with the carrier whereby the notice of arrival of the goods was to be given by mail in the manner above mentioned, and previous shipments had been handled in this manner, the notice being given by mail and stating that the carrier's liability as a common carrier ceased upon arrival of the goods at its depot at Independence. The courts in holding that the railroad was not liable as a common carrier for the loss, declared that a reasonable time within the meaning of the rule was not a time bearing with the distance, convenience, or necessities of the consignee, but was such a period as would enable one living in the vicinity of the place of delivery, in the ordinary course, and within the usual hours of business, to inspect and remove the goods. The court pointed out that the plaintiff might have communicated by mail with the carrier or have been present himself or sent someone to Independence to make a new arrangement for the receiving and storing of the goods. While the rule making the railroad liable as a common carrier for a reasonable time after notice of arrival, it was said, extended a little the duration of the carrier's obligation, it was only thus so far as was necessary to protect the shipper under the usual circumstances and conditions. It would be unreasonable to compel the consignee to remain at the depot of the carrier awaiting the arrival of goods, or to assume all the risk of the uncertainty of delay of transportation and time of arrival, since the goods remained in the custody of the carrier and subject to this control and the exact moment of arrival can seldom be known to the consignee, but the court declared that the obligation of the carrier should not be extended to meet the peculiar needs of the consignee.

§ 6. Notice as Affected by Custom.

While notice to the consignee of the arrival of goods may be dispensed with by custom,[24] where it is customary for a carrier to give notice of the arrival of the goods, it is liable for a failure to give such notice.[25]

Even where it is the custom of a common carrier at the destination of goods to give notice of their arrival, such custom does not have the effect of imposing the positive duty to give such notice. The effect of giving such notice merely affects the time of termination of the liability of the carrier as a common carrier.[26]

§ 7. Custom or Usage at Small Station.

If it has been the custom of a railroad company not to notify consignees of the arrival of their goods at a station where no freight agent is maintained, this custom will not relieve the company from liability for injury to goods

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[24] Atlantic Nav. Co. vs. Johnson, 27 N. Y. Super. Ct. (4 Rob.) 474; Gibson vs. Culver, 17 Wend. 305, 31 Am. Dec. 297; Farmers' & Mechanics' Bank vs. Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491.

[25] Illinois Cent. R. Co. vs. Hopkinsville Canning Co., 116 S. W. 758; G. S. Roth Clothing Co. vs. Maine S. S. Co., 88 N. Y. S. 987, 44 Misc. Rep. 237.

[26] Central of Georgia Ry. Co. vs. Burton, 51 So. 643.

Howe vs. Lexington, Fed. Cas. No. 6067a.—A usage or custom, to excuse a notice by the carrier of the time and place of arrival, or the place of deposit of the goods, must be so clear and notorious as to justify the presumption that all parties acted with an understanding of its character and application.

In Herf & Ferrichs Chemical Co. vs. Lackawanna Line, 73 S. W. 346, 100 Mo. App. 164, where it was held that a local usage or custom of a place to which goods were shipped, requiring the carrier to notify the consignee of their arrival, was not dispensed with by stipulation in the contract of shipment that the goods were to be called for on the day of their arrival.

See also: Allam vs. Pennsylvania R. Co. (Com. Pl.), 5 Pa. Dist. Rep. 54, it was held that a custom of a railroad company not to notify consignees of the arrival of goods at a station where there was no freight agent, did not relieve the company from liability for injury to goods after their arrival thereat, if the consignee was not in fact notified.

after their arrival at such station, if the consignee was not notified.[27]

The express carriers do not, however, enjoy the same exemption from liability as affected by custom or usage at small stations as railroads, since the courts have been reluctant to permit the express carriers to deviate from their obligation to make personal delivery. Some courts have held that an express carrier is not required to make delivery to the consignee at his residence or place of business from small stations or in communities where the traffic is light and the maintenance of delivery wagons and messengers is impracticable. Where it is clearly and notoriously the custom for consignees of express packages to call at the express office and accept delivery of their packages, in communities which are so small as not to justify any other delivery service on the part of the express carrier, the courts have in the main recognized the propriety of the express carrier relieving itself from further liability after arrival of the goods at such station.[28]

§ 8. Personal Delivery.

The early rule of the common law, before the advent of the railroad, made it the duty of a common carrier to make actual delivery of the goods to the consignees personally. This meant that the carrier was under the necessity of making such delivery to the consignee either at his residence or place of business and delivery made elsewhere did not terminate the carrier's common law liability. This requirement could only be abrogated by a special contract or usage, and the latter had to be reasonable in effect.[29]

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(27) Allam vs. Pennsylvania R. Co. (Com. Pl.), 5 Pa. Dist. Rep. 54.
(28) Packard vs. Earl, 113 Mass. 280.
(29) Evans vs. Bristol, etc., R. Co., 10 W. R. 559; Hyde vs. Trent Nav. Co., 5 T. R. 389; Birkett vs. Willan, 2 B. & Ald. 356; Storr vs.

It is the general rule that a railroad common carrier is bound only to carry the goods to its depot at the point to which they are destined.[30]

§ 9. Delivery by Express Companies.

The modern express company combines with the service of transportation that of an intensified personal service. It supplies the personal service which the railroad and water carriers cannot furnish, and is required at common law to deliver the goods to the consignee in person.[31]

Crowley, 1 McClel. & Y. 129; Baldwin vs. American Express Co., 23 Ill. 197, 74 Am. Dec. 190; Schroeder vs. Hudson River R. Co., 5 Doer (N. Y.) 55; Gibson vs. Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; Fisk vs. Newton, 1 Den. (N. Y.) 45, 43 Am. Dec. 649; Eagle vs. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434; Hemphill vs. Chenie, 6 W. & S. (Pa.) 62; Graff vs. Bloomer, 9 Pa. St. 114; Bartlett vs. Steamboat Philadelphia, 32 Mo. 256; Brown vs. Mott, 22 Ohio St. 149; American Express Co. vs. Hockett, 30 Ind. 250, 95 Am. Dec. 691.

[30] Witbeck vs. Holland, 55 Barb. (N. Y.) 443, 38 How. Pr. (N. Y.) 273, **affirmed** 45 N. Y. 13, 6 Am. Rep. 23; Zinn vs. New Jersey S. S. Co., 49 N. Y. 442, 10 Am. Rep. 402, 3 Am. Ry. Rep. 340; Chalk vs. Charlotte, etc., R. Co., 85 N. Car. 423, 9 Am. & Eng. R. Cas. 106, holding that mere deposit on platform of depot and notice to consignee constitute delivery.

It was held in Cahn vs. Michigan Cent. R. Co., 71 Ill. 96, that the fact that the railroad delivers goods to a carter, to be by him carried to the consignee's place of business, only when the consignee's wagons are not at the depot and the consignee has given no special directions about such goods, will not, where the railroad is in no way interested in the cartage, establish a custom to deliver at the consignee's place of business.

[31] Bansemer vs. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367; Taff Vale R. Co. vs. Giles, 2 E. L. & D. L. 822; Storr vs. Crowley, 1 McClel. & Y. 129.

In **Bansemer** vs. **Toledo, etc., R. Co., supra,** it was held that carriers by wagon must deliver to consignee at his residence or place of business, and that their liability continues until such delivery.

The rule in England is that goods must be dealt with, as to delivery of them, in accordance with their nature and with the usual and known course of business of the carrier. "Where it is the usual custom of a carrier to deliver goods, or particular classes of goods, at the consignee's residence or place of business, the carrier is bound to make the actual delivery at such place, and his liability as a common carrier continues until such delivery takes place."—Redman's Law of Railway Carriers (2d ed.) 105.

Hoops vs. Wells Fargo & Co., 176 Ill. App. 620; Sweet vs. Barney, 24 Barb. 533, affirmed in 23 N. Y. 335; Hutchinson vs. United States

The obligation on the part of an express company to make delivery to the consignee personally, i. e., at his residence or place of business, entails the further duty of exercising reasonable diligence in locating the consignee.[32] Its effort to find the consignee and make delivery to him personally must be pursued with reasonable diligence before the express company can discharge itself from responsibility and extraordinary liability as a common carrier.[33]

In some states the duty of the express carriers to make personal delivery is made obligatory by statute.[34]

In **Bullard** vs. **Express Co.,** 107 Mich. 695, 65 N. W. Rep. 551, it was held that "an express company may, so long as the public have notice of the custom, and so long as the company acts in good faith and with regard to the public requirements, establish limits in a city beyond which its agents cannot be required to go to make delivery; and a person dealing with the company with knowledge that such limits exist, cannot compel the company to go beyond them to make a delivery to him."[35]

The right of an express company, however, to dispense with the requirements of a delivery to the consignee per-

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Express Co., 59 S. E. 949; Aldridge Car-Seal Mfg. Co. vs. American Exp. Co., 75 N. W. 94, 117 Mich. 32, 5 Detroit Leg. N. 127; Baldwin vs. American Express Co., 23 Ill. 197; **Packard vs. Earl,** 113 Mass. 280.

(32) **Witbeck vs. Holland, 45 N. Y. 13.**

(33) Id.

(34) United States Express Co. vs. State, 164 Ind. 196, 73 N. E. Rep. 101; American Union Express Co. vs. Wolf, 79 Ill. 430; American Union Express Co. vs. Schier, 75 Ill. 140; Marshall vs. American Express Co., 7 Wis. 1; Sullivan vs. Thompson, 99 Mass. 259; Southern Express Co. vs. Armstead, 50 Ala. 350; American Express Co. vs. Robinson, 72 Pa. St. 274; Union Express Co. vs. Ohleman, 92 Pa. St. 323; Bennett vs. Express Co., 12 Ore. 49; Bullard vs. Express Co., 107 Mich. 695, 65 N. W. Rep. 551.

See also Hutchinson Carriers, 3d ed., Vol. II, sec. 719, pp. 801 to 805, and cases cited in footnotes 11 to 17, both incl.

(35) Hutchinson Carriers, 3d ed., Vol. II, sec. 717, pp. 801 and 802, and cases cited in footnotes 12 and 13.

sonally, thereby changing the character in which it holds the goods from that of common carrier to that of warehouseman, by giving notice to the consignee, and allowing him reasonable time within which to call for them, at small and unimportant stations, has been recognized by some of the courts. "But," says Hutchinson on Carriers, "this privilege will be confined to the delivery of the goods by them at places at which their business is so small as not to justify the employment of messengers or delivery agents or wagons," and "must be in conformity with a usage in reference to which it must be supposed the parties contracted, and that prompt notice must be given."[36]

In **Sweet** vs. **Barney,** 23 N. Y. 335, the court held, that where the consignee had been accustomed to send his porter to the express company's office to receive money shipments transported and brought thereto addressed to the consignee, the business between the bank and the express company having been for a long period transacted in this manner without objection being made thereto by the consignee, the consignee had by such methods and custom waived right of delivery by the express company at his place of business. In this case a package of money was stolen from the porter after being delivered to him by the express company at its office and the court held that the express company was not liable for the loss.

§ 10. Rail Carrier Required to Hold Goods After Arrival. There is serious conflict in the decisions of the courts as to what length of time will be considered reasonable for the removal of the goods, and at the expiration of which the carrier is to be considered as holding them as

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(36) Hutchinson Carriers, 3d ed., **Vol. II, sec. 717, pp. 801 and 802,** and cases cited in footnote 12.

warehouseman. When the delivery by itself as a common carrier to itself as a keeper for hire is a delivery of the goods which discharges the common carrier's responsibility and exceptional liability, logically cannot be determined by any fixed or definite rule, but must depend in a great measure upon the circumstances of each case or class of cases. It is the general rule that the common carrier must give sufficient notice of the arrival of the goods, and therefore the mere placing of the goods in the depot of the carrier at destination does not constitute a delivery. Simply because the carrier has nothing further to do in the matter of moving the goods from one place to another after the goods have reached destination, does not mean that it may escape its further duty of allowing, after the giving of the required notice to the consignee, of a lapse of a reasonable time from the giving of such notice within which the consignee may call and remove the goods. Despite such a liberal rule as that of the Massachusetts courts, that the railroad is not liable as a common carrier for the loss of the goods after arrival since its relation as common carrier ceases upon the unloading of the goods upon the depot platform, most of our courts recognize the right of the consignee to be allowed a reasonable time in which to call for the goods and pay the amount due upon them, and hold the carrier liable in damages where immediate return is made of the goods to the consignor without allowing reasonable time for payment.[37]

The argument in support of the Massachusetts rule is that inasmuch as the time of arrival of goods transported by railroad is ordinarily definite and certain, and the consignee is usually informed by the consignor that the goods are on the way, it would be unduly burdensome to impose upon the carrier the duty of notifying the consignee and

(37) Great Western R. Co. vs. Crouch, 3 H. & N. 183.

continuing its common carrier liability for a reasonable time after the giving of such notice. On the other hand, the reasons for requiring the carrier to notify the consignee of the arrival of goods and hold the goods for a reasonable length of time after giving of such notice, are that during the course of transportation the goods are in the sole custody and control of the carrier and that the exceptional liability of the common carrier should apply during the period between the arrival of the goods and the actual taking possession of them by the consignee. In this view it is urged as impracticable to require or expect the consignee to keep himself informed of the exact time of arrival of the carrier's trains and to have himself at the carrier's depot at the proper moment of arrival, equipped to remove the goods from the station. And this is the prevailing view of the American courts.

During the period which must ordinarily elapse between the actual arrival of the goods at the carrier's depot at destination and their removal by the consignee, or a reasonable time within which the consignee might have removed them, the goods remain in the sole custody and control of the carrier, giving it the same opportunity for negligent conduct toward the goods as existed during their actual transportation, and, in this view, the liability of the common carrier should not be terminated until such reasonable time has elapsed after the arrival of the goods or until consignee has received notice of their arrival and has had a reasonable time thereafter within which to remove them.[38]

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(38) Moses vs. Railroad, 32 N. H. 523; Fenner vs. Railroad, 44 N. Y. 505; Roth vs. Railroad, 34 N. Y. 548; Hedges vs. Railroad, 49 N. Y. 223; Lemke vs. Railroad, 39 Wis. 449; Tallahassee Falls Mfg. Co. vs. Railway Co., 128 Ala. 167, 29 So. Rep. 203; Railway Co. vs. Nevill, 60 Ark. 375, 30 S. W. Rep. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208; McMorrin vs. Railway Co., 1 Ont. L. R. 561, 1 Can. Ry. Cas. 217; Welch vs. Railroad Co., 68 N. H. 206, 44 Atl. Rep. 304; Berry vs.

§ 11. Delivery Must Be Made to Rightful Person or Party.

The law does not excuse a common carrier from liability for nondelivery superinduced by fraud, imposition or mistake. The law exacts of the carrier absolute certainty in making delivery to the person or party rightfully entitled to the goods. The law "puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may have seemed to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned. If, therefore, the person who applies for the goods is not known to the carrier, and he has any doubt as to his being the consignee, he should require the most unquestionable proof of his identity; or, if from any cause he should have a reasonable doubt as to whether the per-

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Railroad Co., 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep. 781; Burr vs. Express Co., 71 N. J. L. 263, 58 Atl. Rep. 609.

"It is said, however, that no indulgence will be given to the consignee by reason of the circumstances of his condition or situation, which make delay in the removal of the goods unavoidable on his part; nor will the distance at which he may reside or have his place of business from the place of their deposit be taken into consideration; but he will be required to remove them with the same expedition as though he lived in the vicinity of the warehouse. In other words, the time within which the consignee is required to remove the goods will not be made to vary with his distance, convenience or necessity, but only such time will be allowed as would enable him, if living in the vicinity of the place of delivery, to remove them in the ordinary course and in the usual hours of business. He must, moreover, proceed to remove the goods with diligence after he is informed of their arrival, and must provide himself with ample means for doing so."—Hutchinson Carriers, 3d ed., Vol. II, sec. 713, pp. 796 and 797, and cases cited in footnote 28.

"Where the owner of the goods prefers to leave them in charge of the carrier until it suits his convenience to remove them, instead of acting promptly, the carrier will not be responsible for their loss if they are destroyed by fire not caused by its negligence."—Stapleton vs. Ry. Co., 133 Mich. 187, 94 N. W. Rep. 739.

See also Hedges vs. The Railroad, 49 N. Y. 223.

son claiming the goods was entitled to them, he should refuse delivery to him until he has established his right."[39]

A common carrier is required to deliver the goods to the proper owner or to one legally entitled to the possession thereof, if the carrier has due notice of such right, before it delivers to the consignee or to his order, without the bill of lading.[40]

At common law, a delivery of goods to a common carrier billed under a straight bill of lading to a named consignee, vests the title in the consignee. And in the absence of statute or a stipulation by the consignor to a contrary effect, or a notice to the carrier to control the effect of it, a delivery to the consignee exonerates the carrier from liability.[41]

§ 12. Diligence Required in Identification of Consignee.

A common carrier is justified in making a qualified refusal to deliver the goods until reasonable evidence is offered to show that the person claiming himself to be the consignee of the shipment is in fact the consignee, for

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(39) Hutchinson Carriers, 3d ed., Vol. II, sec. 668, p. 740, and citing Sellers vs. Railway Co., 123 Ga. 386, 51 S. E. Rep. 398; Idaho, 93 U. S. 575.

(40) Ensign vs. Illinois Cent. R. Co., 180 Ill. App. 382; W. H. Stanchfield Warehouse Co. vs. Central R. of Oregon, 136 Pac. 34.

If it is shown that a carrier has delivered the goods to the real owner and person entitled thereto, its failure to deliver the goods to the consignee is excused.—Brunswick vs. United States Express Co., 46 Iowa 677.

A carrier of goods is always justified in delivering them to their true owner, even though such owner may not be consignee or lawful holder of the bill of lading.—W. H. Stanchfield Warehouse Co. vs. Central R. of Oregon, 136 Pac. 34.

(41) Bonds-Foster Lumber Co. vs. Northern Pac. Ry. Co., 101 Pac. 877, 53 Wash. 302.

The Supreme Court of Michigan in Sturges vs. Detroit, G. H. & M. Ry. Co., 131 N. W. 706, held, in the case of a shipment of freight to a third person and delivery to the shipper of bill of lading, that the consignee is **prima facie** the owner, but this presumption of ownership may be rebutted by showing the actual intent of the shipper when the goods were delivered to the carrier.

the carrier is bound, at its peril, to deliver the goods to the consignee only.[42]

§ 13. Delivery to Agent of Consignee.

The obligation of a common carrier to deliver goods to the consignee and to no other person is fully discharged when it delivers them to the duly authorized agent of the consignee.[43] But if the carrier delivers the goods to one not the duly authorized agent of the person or persons to whom the goods are consigned, there is no delivery and the carrier remains liable.[44]

§ 14. Misdelivery Superinduced by Fraud, Imposition or Mistake.

The courts will not excuse the common carrier, through any circumstances of fraud, imposition or mistake, from responsibility for a delivery to a wrong person.[45]

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(42) American Express Co. vs. Stack, 29 Ind. 27; McEntee vs. New Jersey S. S. Co., 45 N. Y. 34.

(43) Brunswick & W. R. Co. vs. D. Rothchild & Co., 46 S. E. 830, 119 Ga. 604; Illinois Cent. R. Co. vs. Simpson, 17 Ill. App. (17 Bradw.) 325; Missouri Pac. R. Co. vs. Weil, 57 Pac. 853, 8 Kan. App. 839.

(44) Charles Schlesinger & Sons vs. New York, N. H. & H. R. Co., 85 N. Y. Supp. 372; Ela vs. American Merchants' Union Exp. Co., 29 Wis. 611, 9 Am. Rep. 619.

See also Armensrout vs. St. L., K. C. & N. R. R. Co., 1 Mo. App. 158.

Negligent delivery to person not the consignee.—Price vs. The Railroad Co., 50 N. Y. 213; Winslow vs. Vermont, etc., R., 42 Vt. 700; American Express Co. vs. Fletcher, 25 Ind. 492; Southern Express Co. vs. Van Meter, 17 Fla. 783; American Express Co. vs. Sack, 29 Ind. 27; Samuel vs. Cheney, 135 Mass. 278; Edmunds vs. Transportation Co., 136 Mass. 283.

For contrary view see the Express Co. vs. Shearer, 160 Ill. 215, 43 N. E. Rep. 816, 37 L. R. A. 177, 52 Am. St. Rep. 324, affirming 43 Ill. App. 641.

(45) Hutchinson Carriers, 3d ed., Vol. II, sec. 668, pp. 739 to 741, and cases cited in footnotes 11 to 15, both incl.

See also Express Co. vs. Shearer, 160 Ill. 215, 43 N. E. Rep. 816, 52 Am. St. Rep. 324, 37 L. R. A. 177; Express Co. vs. Shearer, 43 Ill. App. 641; Cavallaro vs. Railway Co., 110 Cal. 348, 42 Pac. Rep. 918, 52 Am. St. Rep. 94; Dudley vs. Railway Co., 52 S. E. Rep. 718.

(1) **Fraud.** A common carrier cannot discharge his responsibility and liability as such by delivering goods to a person presenting a forged order for the same.[46]

(2) **Impersonating Consignee.** If the person who applied to the carrier for the goods is unknown to it and there is any doubt as to his being the consignee, the carrier should require "the most unquestionable proof of his identity." Until the person so claiming the goods has established his right thereto, the carrier should refuse delivery to him if for any cause the carrier has a reasonable doubt that such person is rightfully entitled to the goods.[47]

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[46] Powell vs. Myers, 26 Wend. (N. Y.) 591; Price vs. The Railroad Co., 50 N. Y. 213; Winslow vs. Vermont, etc., R. R., 42 Vt. 700; American Express Co. vs. Fletcher, 25 Ind. 492; Southern Express Co. vs. Van Meter, 17 Fla. 783; American Union Exp. Co. vs. Milk, 73 Ill. 224.

[47] Sellars vs. Railway, 123 Ga. 386, 51 S. E. Rep. 398.

Hutchinson on Carriers refers to Price vs. The Railroad Co., 50 N. Y. 213, as follows: "In **Price** vs. **The Railroad Co.,** the facts as found were, that a person, with the intention of swindling the plaintiff, addressed to him a letter in the name of the fictitious firm, requesting him to send the goods to the address of the firm. Plaintiff, supposing the order to be honest, although he did not know any such firm, shipped the goods by the defendant's road, consigned as directed in the order. There was in fact no such firm as that in whose name the goods had been ordered, and the letter written in its name was a part of a scheme to defraud plaintiff of the goods. When the goods arrived at destination, a stranger to the defendant's agent called at their office there, paid the freight on the goods, and was permitted to take them away. The defendant's agent knew of no such firm as that signed to the letter ordering the goods, and to which they were consigned and delivered the goods without requiring any evidence of the person claiming them as to his identity, or of his connection with such a firm. It was also found, as a matter of fact, that the person to whom the delivery was made was the same person who had written the forged letter to the plaintiff ordering the goods, and that his evident purpose was to obtain the goods by falsely assuming to be the party to whom they were, by his direction, consigned; in which deal he succeeded. The plaintiff, having thus lost the goods, sued the carrier for a conversion of them. The court from which the appeal had been taken had held the carrier to be excusable under these circumstances, the very person having obtained the goods who had ordered them, although he had done so in a false name, for the purpose of defrauding the plaintiff. But this judgment was reversed, and it was said that the common carrier

(3) **Delivery to Consignee Though a Swindler.** In those cases where the carrier, acting in good faith and with due diligence, delivers goods to the person to whom they are consigned, even though the consignor directed the goods to such consignee believing him to be another person and induced by fraud to direct delivery to such consignee, the carrier is not liable for misdelivery.[48]

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must, at his peril, deliver property to the true owner; for if delivery be made to the wrong person, either by an innocent mistake or through the fraud of another, he will be held responsible, and the wrongful delivery will constitute a conversion. It was the duty of the defendant's agent to make inquiry as to the existence of such a firm as that to which the goods were consigned, and, upon its being ascertained that there was no such firm, and that a delivery could not therefore be made, he should have warehoused the goods for the owner; instead of which he delivered them to a stranger, without making any inquiry as to or what he was. If the delivery had been made to another person than the real swindler, under the like circumstances, the defendant would have been clearly liable. The question, therefore, was, whether the person who wrote the order acquired a right, so far as the defendants were concerned, to a delivery of the goods; in other words, whether, as to the carrier, he was the consignee. If he was, then a delivery to him discharged the carrier, upon the principle that any delivery, valid as to the consignee, is a defense for the carrier and to all persons. But it was said that the plaintiff did not intend that the goods should be delivered to the writer of the order, but to the firm to which they were directed, and that the former was not the consignee. The delivery was therefore made to one who was neither the consignee nor the owner of the goods, and the defendant was held liable for their value."—Hutchinson Carriers, 3d ed., Vol. II, sec. 669, pp. 741 to 744; American Exp. Co. vs. Stack, 29 Ind. 27.

[48] Samuel vs. Cheney, 135 Mass. 278.

Referring to the case of Edmunds vs. Transportation Co., 135 Mass. 293, Hutchinson on Carriers says:

But to be distinguished from these cases, according to some, although not all of the authorities, are those in which the carrier, acting in good faith and with due diligence, delivers the goods to the person to whom they are consigned, though the consignor may have induced by fraud to direct the delivery of goods to such consignee. In such cases the carrier is held not to be liable. The leading case upon this question is Samuel vs. Cheney, decided by the Supreme Judicial Court of Massachusetts. In that case a swindler, assuming the name of A. Swannick, sent a letter to the plaintiff asking for a price list of cigars, and giving his address as "A. Swannick, P. O. box 1595, Saratoga Springs, N. Y." The plaintiff replied, addressing his letter according to this direction. The swindler then sent another letter ordering a quantity of cigars. These plaintiff shipped by the defendant, and at the same time sent a letter to the swindler

addressed as above notifying him of the shipment. There was at this time in Saratoga Springs a reputable dealer of the name of Arthur Swannick, who did business as "A. Swannick" at the corner of Ash and Franklin streets, and who was in good standing and reported as solvent by a commercial agency to which plaintiff applied for information. No other A. Swannick appeared in the Saratoga directory or was known to the commercial agency. But about this time a man appeared at Saratoga, rented a store at 16 Congress street, hired box 1595 in the postoffice, and used printed letter-heads with his name printed as "A. Swannick, P. O. box 1595." This man wrote the letters to plaintiff and received the replies. He soon after disappeared. Plaintiff supposed the letters were written by, and that he was dealing with, Arthur Swannick. He sent the goods directed "A. Swannick, Saratoga Springs, N. Y." Defendant carried the package of cigars directed to A. Swannick, which he offered to Arthur Swannick, who refused them, saying he had ordered no cigars. Afterwards on the arrival of the packages in question, defendant took them to the store at 16 Congress street, and delivered them to the person in possession, who receipted for them in the name of "A. Swannick." The swindler's real name was assumed, in the case, not to be A. Swannick.

An action being brought to charge defendant with the loss of the goods, Morton, C. J., after passing the question whether, under the circumstances, the property in the goods passed to the swindler so that a **bona fide** purchaser could hold them as against the plaintiff, said: "The contract of the carrier is not that he will ascertain who is the owner of the goods and deliver them to him, but that he will deliver the goods according to the directions. If a man sells goods to A., and by mistake directs them to B., the carrier's duty is performed if he delivers them to B., although the unexpressed intention of the forwarder was that they should be delivered to A.

"If, at the time of this transaction, the man who was in correspondence with the plaintiff had been the only man in Saratoga Springs known as, or who called himself, A. Swannick, it cannot be doubted that it would have been the defendant's duty to deliver the goods to him according to the direction, although he was an imposter, who by fraud induced the plaintiff to send the goods to him. The fact that there were two bearing the name made it the duty of the defendant to ascertain which of the two was the one to whom the plaintiff sent the goods. * * *

"The plaintiff contends that he intended to send the goods to Arthur Swannick. It is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is that he intended to send them to the man who ordered and agreed to pay for them, supposing erroneously that he was Arthur Swannick. It seems to us that the defendant, in answer to the plaintiff's claim, may well say, we have delivered the goods intrusted to us according to your directions, to the man to whom you sent them, and who, as we are induced to believe by your acts in dealing with him, was the man to whom you intended to send them; we are guilty of no fault or negligence." The cases of Winslow vs. Railroad, American Express Co. vs. Fletcher, and Price vs. Railway, cited in the foregoing sections, say the court, "differ widely in their facts from the case at bar and are distinguishable from it."

(4) **Delivery to Finder of Bill of Lading.** Where a carrier sends to the consignee of certain goods a notice that the goods have arrived at destination, such notice bearing a request that it be returned to the carrier and the consignee call to pay the freight charges, and that all orders for the delivery of goods be given the car number and date of the freight bill, such notice being delivered to the consignee's truckman, who lost it, and a third person presented the notice to the carrier and received the goods referred to in it, the court held that such notice furnished no such evidence of title as to justify the carrier in delivering the goods upon the production of the notice, without ascertaining that the delivery was actually being made to the consignee.[49]

§ 15. Delivery in Accordance with Instructions of Unauthorized Agent of Shipper.

Where a carrier delivers the goods to a person other than the consignee named in the bill, at the direction of an agent of the shipper who is duly authorized to act for the shipper in some matters, but not authorized to give shipping instructions to carriers, the carrier is held to be liable for misdelivery.[50]

§ 16. Delivery Where Consignor Retains Title to Goods.

The practice of delivering shipments to railroad carriers under so-called "order bills of lading" has become universal in the United States. Under the provisions of such

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The application of the rule in the case of Samuel vs. Cheney has, however, been qualified even by those courts which recognize that case as enunciating a correct principle of law, and it has been held that, "if there be negligence in the delivery, resulting in the goods being turned over to one who represents a person well known at the place of delivery, the carrier will be liable."

(49) Sinsheimer vs. New York Cent. & Hudson River R. Co., 46 N. Y. S. 887, 21 Misc. Rep. 45.

(50) Wernwag vs. T. W. & B. R. R. Co., 117 Pa. St. 46.

bills of lading, goods are sent subject to the order of the consignor to notify the consignee, the title to the goods remaining in the consignor. This method of consignment may be pursued for either of two purposes—to transmit the bill of lading with draft attached through a bank where the consignee must redeem the draft in order to receive the bill of lading to be thereafter surrendered by him to the carrier for delivery of the shipment, or to permit inspection of the goods by the consignee.[51]

If the carrier delivers the goods to the consignee without surrender of the bill of lading, where the goods are shipped subject to the order of the consignor to notify the consignee, the title thereof remaining in the consignor, the carrier remains liable to the owner of the goods.[52]

§ 17. Conversion.

Conversion at common law is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the alteration of their condition or the exclusion of the owner's rights.[53]

A conversion by a common carrier, or other bailee, implies some wrongful act, a wrongful disposition or withholding of the property. Mere nonfeasance, or failure

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(51) Conrad Schoop Fruit Co. vs. Railroad Co., 91 S. W. Rep. 402.

(52) Pennsylvania R. Co. vs. Stearn & Siegel, 119 Pa. St. 24.

(53) Black's Law Dict., tit. "Conversion," citing 44 Me. 197, 36 N. H. 311, 45 Wis. 262.

The New York courts have defined conversion to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A **constructive** conversion takes place when a person does such acts in reference to the goods of another as amount in law to an appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. (68 N. Y. 524.)

"Conversion" and "carrying away" are not synonymous nor convertible terms. There may be a conversion without any carrying away. (26 Ala. 101.)

to perform a duty imposed by contract or implied by law, does not constitute a conversion. Hence, a mere nondelivery does not necessarily constitute a conversion.[54]

While there are many decisions in conflict, the rule is well settled that the delivery of goods at the wrong place and failure to notify the shipper of the wrong delivery does not of itself constitute a conversion of the goods.[55]

§ 18. Misdelivery Due to Duplicate Names of Destination.

It is a question of fact rather than a question of law whether the carrier's liability extends in any case where a carrier accepts a shipment for a point which is of the same name as that of another point. In such cases where suit is brought against the carrier for damages resulting from misdelivery of shipments destined to points of duplicate names, the question of fact goes to the jury to determine whether or not, under all of the facts and circumstances, the carrier used the proper degree of diligence at the time of acceptance of the shipment to ascertain its correct destination.

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(54) Vandalia R. Co. vs. Upson Nut Co., 101 N. E. 114; Clark vs. American Exp. Co., 106 N. W. 642, 130 Iowa 254; Way vs. Dennie, 174 Mass. 43, 54 N. E. 347; Chemical Co. vs. Lackawanna Line, 17 Mo. App. 274; Way vs. Dennie, 174 Mass. 43, 54 N. E. 347; Hepp vs. Boston & M. R. R., 44 Atl. 910, 69 N. H. 139; Higgins vs. United States Exp. Co., 85 Atl. 450; Taugher vs. Northern Pac. Ry. Co., 129 N. W.; Texas Central R. Co., 133 S. W. 295; R. W. Williamson & Co. vs. Texas & Pac. Ry. Co., 138 S. W. 807.

In Pecos & N. T. Ry. Co. vs. Porter, 156 S. W. 267, it was held that where a terminal carrier of interstate shipment, through a mistake as to the rates, refused to deliver the goods until an excessive rate was paid, the refusal amounted to a conversion.

But a shipper of goods cannot charge the carrier with conversion for a delay, however long, if they are faithfully kept until they have been demanded by the carrier and their delivery refused.—Ryland & Rankin vs. Chesapeake & Ohio Ry. Co., 46 S. E. 923, 55 W. Va. 181.

(55) See also Railway Co. vs. Potts & Co., 33 Ind. 564, 71 N. E. Rep. 685.

The rule is well stated in **Blakeslee Mfg. Co.** vs. **Hilton Chemical Co.,** 5 Pa. Super. Ct. 184, where the court held in 1897 that the taking of goods marked "Newton Station, M. Co., Pa.," by the carrier and their subsequent delivery to "Newtown" in another county instead of "Newton" in M. Co., was negligence, and it was therefore the duty of the carrier to have ascertained at the time it accepted the shipment what was its correct destination.

In those cases which have come before the Interstate Commerce Commission for refund of freight charges because of misrouting of shipments due to duplicate names of destinations, the Commission has insisted that the shipper show himself to be without fault in contributing to the carriers' misrouting. For instance, in the case of **Iola Portland Cement Co.** vs. **M., K. & T. Ry. Co. et al.,** Unrep. Op. 444, decided October 9, 1911, the Commission allowed the shipper reparation because of carrier misrouting a shipment of cement delivered to Frederick, Las Animas Co., Colorado, when the same was intended for Frederick, Weld County, Colorado. In this case it was shown that the shipper had given specific instructions concerning the routing, that the carriers named in such instructions had available routes to both towns, and that the shipper had billed and the carrier had transported previous shipments to Frederick, in Weld County.

In **Ohio Iron & Metal Co.** vs. **C., M. & St. P. Ry. Co.,** 28 I. C. C. 703, the Commission held that the carrier could not legally refund the amount of overcharges claimed on the theory that the misrouting resulted clearly from the carrier's error, unless it could be shown that the shipping order prepared by the shipper contained instructions by which the carrier could have ascertained the correct address, or by the use of ordinary diligence could have learned the true destination, or that if the published

tariffs of the carrier provided for prepayment of freight charges to non-agency stations, and through a compliance with this requirement in regard to a particular shipment notice of the fact that there were two stations of the same name in the same state would thereby have been given to the shipper, and enabled him to have given fuller directions concerning the true destination, in which event such a case of carrier's error in routing would have possibly been established as to warrant a refund of the overcharges without first obtaining a specific order from the Commission. The Commission called attention to the fact that there being only one station of the particular name on the carrier's line, and such carrier making the entire haul, and no circumstances indicated by the shipper that some other station with a similar name was intended, the carrier might reasonably infer that the station which was on its own line was the true destination point.

The question of whether the carrier used due diligence, or was by the circumstances thrown upon its own peril to ascertain the correct destination, must first be answered, and if the facts and circumstances establish the fact that the carrier did not use the required diligence to ascertain the correct destination, it is guilty of negligence and therefore must respond in damages.

§ 19. Delivery as Warehouseman.

A warehouseman is the owner of a warehouse, who, as a business, and for hire, keeps and stores the goods of others.[56] And a common carrier may become a warehouseman as to the goods in its possession and custody, when it has completed their transportation and properly offered such goods for delivery, or so situated them that its obligation and responsibility as a common carrier has

(56) Black's Law Dict., tit. "Warehouseman."

been completed and placed such goods in a safe and secure place to await their removal by the consignee or owner. The rules of law governing delivery by a carrier as warehouseman are less stringent than those to which it is subjected as a common carrier. So, if the carrier acting as a warehouseman makes a wrong delivery of the goods, being induced to do so through circumstances of fraud, imposition or mistake, it is held to a less strict accountability than as a common carrier. If the carrier has made reasonable effort to locate the consignee and has failed to do so, or if it has tendered the goods to the consignee and the latter has refused to accept them, or if for any other reason the carrier's common carrier relation has ceased, it is no longer liable, because of such nondelivery, for conversion of the goods but merely acts as an ordinary bailee.[57]

This view is entirely consonant with the body of the common law as it looks upon the relation and responsibility of common carriers, for so long as the carrier continues in the relation of common carrier to the goods, it is held to absolute certainty in its engagement to make delivery to the person or party rightfully entitled thereto, but when for any cause the carrier ceases to retain the goods as a common carrier and holds the goods as a warehouseman or ordinary bailee, its responsibility for misdelivery or otherwise is for that degree of negligence which amounts to failure to exercise reasonable care and caution.[58]

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[57] Stephenson vs. Hart, 4 Bing. 476; Guss vs. Budd, 3 Brod. & Bing. 177; Heugh vs. The Railway Co., 2 L. R. 5 Exch. 50.

[58] Hutchinson Carriers, 3d ed., Vol. II, secs. 681 to 686, pp. 759 to 766, and cases cited in footnotes 1 to 10, both incl.

See also Southern Ry. Co. vs. W. C. Adams Mach. Co., 51 So. 779; Gulf C. & S. F. Ry. Co. vs. North Texas Train Co., 74 S. W. 567, 32 Tex. Civ. App. 93; Chicago, R. I. & P. Ry. Co. vs. S. Marshall Bulley & Son, 140 S. W. 480; White vs. Colorado Cent. R. Co., Fed. Cas. No. 17543 (5 Bill. 428, 3 McCreary 559); Judd vs. New York & T. S. F.

§ 20. Liability as Warehouseman When Consignee Cannot Be Found or Refuses Goods.

A warehouseman or ordinary bailee is responsible only for such losses as are directly attributable to its negligence, and that negligence is measured by the failure of the warehouseman or ordinary bailee to guard and protect the goods in its possession with reasonable care and caution. So, if it is impossible for the warehouseman or ordinary bailee to make delivery, either because of its inability to find the consignee or the latter's refusal to accept the goods, or if the consignee unreasonably delays in removing the goods, and the warehouseman or ordinary bailee can show that the loss was not attributable to its fault or negligence, it is relieved from liability. When a carrier can show that its custodianship of the goods is merely that of a warehouseman, it is relieved from all liability for losses occurring because of accidental fire, explosion from goods the dangerous nature of which it was not informed, inherent vice or defect in the goods, depreciation in market value, theft when not through its fault or negligence, and other independent causes.[59]

§ 21. Delivery by Carrier to Independent or Public Warehouse.

A carrier, having completed his transportation as, and relation of, common carrier to the goods, by complying with the requirements of the law in attempting delivery

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Co., 117 Fed. 206, 54 C. C. A. 238 (**rehearing** granted 118 Fed. 826, 55 C. C. A. 438, **affirmed** 128 Fed. 7, 62 C. C. A. 515); Farmers' Loan & Trust Co. vs Oregon Railway & Nav. Co. (C. C.), 73 Fed. 1003; Leland vs. Chicago, M. & St. P. Ry. Co., 23 N. W. 390; Adams Exp. Co. vs. Single, 10 Ky. Law Rep. 358.

[59] Fenner vs. Railroad Co., 44 N. Y. 505; Railroad Co. vs. Carter, 165 Ill. 570, 46 N. E. Rep. 374, 36 L. R. A. 527, **reversing** 62 Ill. App. 618; Stapleton vs. Railroad Co., 133 Mich. 187, 94 N. W. Rep. 739; Treleven vs. Railroad Co., 89 Wis. 598, 62 N. W. Rep. 536; Adler vs. Weir, 96 N. Y. Supp. 736; Hasse vs. Express Co., 94 Mich. 133, 53

of them, may deposit the goods in an independent or public warehouse. If the consignee or owner of the goods, after their arrival at destination and reasonable opportunity has been extended in which to pay the freight charges and remove the goods, fails or refuses to pay such charges and accept the goods, the carrier may store the goods with an independent or public warehouseman subject to its lien for the freight and at the expense of the consignee or owner. But the warehouseman, in this instance, does not hold the goods for the consignee or owner, but for the carrier to which it is responsible, for loss or damage occurring through its omission to exercise reasonable care and caution in the preservation and protection of the goods.[60]

Since the warehouseman in the latter instance is merely the agent of the carrier for the purpose of preserving the carrier's lien for freight, he cannot deliver the goods to the consignee or owner except upon the payment and satisfaction of the carrier's lien.[61]

N. W. Rep. 918, 34 Am. St. Rep. 328; Weed vs. Barney, 45 N. Y. 344; Hudson vs. Baxendale, 2 Hurl. & N. 575; Neal vs. Railroad Co., 8 Jones (Law) 482; Byrne vs. Fargo, 73 N. Y. Supp. 943, 36 Misc. 543; Kremer vs. Southern Exp. Co., 6 Cold. 356; Fisk vs. Newton, 1 Denio 45.

(60) Western Transp. Co. vs. Barber, 56 N. Y. 544; B. Eddy, 5 Wall. 481; Brittan vs. Barnady, 21 How. 527; Alden vs. Carver, 13 Iowa 253; Davidson S. S. Co. vs. 119, 254 Bushels of Flax Seed, 117 Fed. 283; Gregg vs. Railroad Co., 147 Ill. 550, 35 N. E. Rep. 343, 37 Am. St. Rep. 238.

(61) Compton vs. Shaw, 1 Hun, 441.

"The question whether the carrier can acquire a lien for his charges, as against the right of the true owner of the property to its possession, upon property which has been intrusted to him by a wrong-doer, who was unlawfully in its possession, and has unlawfully and without authority bailed it to the carrier, has been much mooted. In England it seems to be settled beyond controversy that the lien attaches to the goods under such circumstances in favor of both the carrier and an innkeeper. Many cases have there occurred in regard to the right of the innkeeper to the lien, where goods of which he was unlawfully in possession have been brought by a guest to an inn, and it has been uniformly held that in such cases the innkeeper had the right to retain the goods for the board of the

§ 22. After Tender of C. O. D. Goods to Consignee Carrier Holds as Warehouseman.

It is a common practice, especially in the use of the express service, to send goods C. O. D., the abbreviation meaning not to deliver the goods until they are paid for, including the price of the goods and the freight.[62]

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guest against the claim of the lawful owner, unless the innkeeper knew that the goods were not the property of the guest at the time of their being brought to his inn. But it is immaterial whether the chattel be animate or inanimate, or whether its keep is attended with expense to the innkeeper or not. The law gives in his lien upon the carriage as well as upon the horses which draw it, no matter to whom it may belong, if he did not know that it was not the property of the guest when it was brought to the inn, because, as was said, the principle on which an innkeeper's lien depends is that he is bound to receive travelers and their goods which they bring with them to the inn, and, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in the performance of his duty, he is bound to receive. Indeed, so extensive were the rights of an innkeeper considered that, until the decision in Sunbolf vs. Alford, the opinion prevailed that an innkeeper might detain the person of his guest or take off his clothes as security for his bill."—Hutchinson Carriers, 3d ed., Vol. II, sec. 882, pp. 973 and 974, and cases cited in footnotes 63 to 67, both incl.

"Nor does the fact that the carrier has a lien upon the goods, for his freight or any other account, confer upon him the right to sell them to satisfy his charges or to reimburse himself for expenses incurred by him for the owner on their account. And if the consignee refuse to pay the freight and to receive them the carrier must store them with some responsible warehouseman, subject to his lien, and, unless the lien is discharged by the owner, must resort to legal proceedings to have them sold, and the proceeds applied to the payment of his claim. If, in such cases, the goods bestored in a warehouse not belonging to the carrier, the warehouseman will hold them under the authority of the carrier and not of the owner, and his possession will be regarded as that of the carrier for the purpose of preserving his lien; and the goods will become subject to the lien of the warehouseman as well as to that of the carrier."—Hutchinson Carriers, 3d ed. Vol. II, sec. 786, page 871, and cases cited in footnotes 21 and 22.

See also Black vs. Ashley, 80 Mich. 90, 44 N. W. 1120; Arthur vs. St. Paul & D. Ry. Co., 38 Minn. 95, 35 N. W. 718.

(62) "It is proper here to discuss the nature and import of the letters C. O. D., as placed on the receipt and on the box by the express company.Do they amount to a contract? And, if so, what is the extent of it? What are the liabilities assumed by the company, and how can they discharge them? These are interesting questions to the whole business community, and deserve careful and full investigation, the more especially after the effort made by this company to

It is the duty of the carrier to give the consignee a reasonable opportunity to pay. And where a carrier returns the goods to the owner immediately upon tender of them to the consignee, who for want of reasonable opportunity in which to prepare to pay for and accept the goods, refuses to pay for them and remove them, the carrier is liable to the consignee for damages.[63]

After a single tender of C. O. D. goods the carrier holds such goods in the character of warehouseman.[64]

§ 23. Delivery as Affected by Stoppage in Transitu.

The right of the consignor or owner of the goods of **stoppage in transitu** is a right **stricti juris.**[65] The law, therefore, strictly scrutinizes the resort to its use and extent to which the carrier may show stoppage to excuse

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deprive them of any force of means. The council treats them as an enigma not legally explainable. We are inclined to think that if an express company or other common carrier resort to enigmas in the conduct of their business, they shall not alone be permitted to afford the solutions. Their agent testifies that the letters mean that the express company was to collect of the consignee, on delivery, the amount due from him and marked on the package, and to return such amount to the consignor; and this is the experience of the whole business community employing such an agency. The letters are the initials, and so understood, of the words 'Collect on Delivery;' and this undertaking by those letters be appellants assumed, and they must be held to a strict performance thereof."—The American Express Co. vs. Lesem, 39 Ill. 312.

(63) The Great Western Ry. vs. Crouch, H. & N. 183.

See also Hardy vs. American Exp. Co., 182 Mass. 328, 63 N. E. 375, 59 L. R. A. 731; Lane vs. Chetwick, 146 Mass. 68, 15 N. E. 121; American Exp. Co. vs. Greenhalgh, 80 Ill. 68; Pacific Aviation Co. vs. Wells Fargo & Co., 128 Pac. 438; Missouri, K. & T. Ry. Co. vs. Levine, 93 S. W. 1095.

(64) Hasse vs. Express Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 329; Storr vs. Crowley, McClel. & Y. 129; Marshall vs. The American Exp. Co., 7 Wis. 1; Adams Exp. Co. vs. McConnell, 27 Kan. 238; Railway Co. vs.Heilprin, 95 Ill. App. 402; Byrne vs. Fargo, 73 N. Y. Supp. 943, 36 Misc. 543.

(65) A Latin term meaning strict right or law; according to strict law. "License is a thing **stricti juris;** a privilege which a man does not possess by his own right, but it is conceded to him as an indulgence, and therefore it is to be strictly observed."—2 Rob. Adm. 117 (Black's Law Dict., tit. "Stricti Juris").

delivery. The right of **stoppage in transitu** rests only in the vendor of the goods, in the case of insolvency of the vendee or buyer, and he may exercise this right without regard to any particular form or mode of procedure. He is merely required to declare either personally or through his duly authorized agent, a countermand of delivery by the carrier in a notice to the carrier stating the vendor's claim and permitting delivery, whereupon the goods may be returned by the carrier to the vendor or held subject to his orders.

Since the insolvency of the vendee is essential to the exercise of the right of **stoppage in transitu** by the vendor, the carrier, if he knows the fact that the vendee is not insolvent, continues liable to the consignee, provided the carrier returns the goods to the vendor or holds them subject to his orders, thereby failing to make delivery to the consignee. In other words, "the carrier obeys a **stoppage in transitu** at his peril, if the consignee be in fact solvent," and it has been declared a "not unreasonable rule to require that, at the time the consignee so refused the goods, he should have evidenced his insolvency by some overt act." But since the insolvency of the vendee is essential, but not absolute, in the exercise of the right of **stoppage in transitu** by the vendor and as the carrier accepts or rejects the vendor's notice of stoppage at its own peril, it becomes important to the carrier what course it pursues for its own protection. If reasonable doubt exists as to the actual right of the vendor to stoppage in a particular case, the carrier, instead of complying with or declining to recognize the notice of stoppage, may require that it be allowed a reasonable time to investigate the condition of the vendee, and if such investigation fails to convince the carrier of its freedom from responsibility in accepting or declining the notice of stoppage, it may

resort to the court for a determination of the question, in the meantime holding the goods as warehouseman or ordinary bailee.[66]

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(66) **Carrier may show stoppage to excuse delivery.**—Another excuse which the carrier may set up for the nondelivery of the goods is, that the vendor has exercised his right of stoppage **in transitu.** This right arises upon the discovery by the vendor, after the sale of the goods on a credit, of the insolvency of the buyer, and is said to be based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and has put them into the hands of the carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. This right of the vendor of the goods is held to continue from the time he parts with their possession until they have come into the actual possession of the buyer, and may be enforced by him, no matter into whose possession they may have come in the course of the transportation, at any time before their delivery to the buyer or his agent, or to a purchaser of them from the buyer, by a **bona fide** indorsement and transfer of the bill of lading. The right is highly favored by the law on account of its intrinsic justice, and prevails almost universally among civilized nations; but it arises only in favor of one who stands in the relation of vendor to the goods."—Hutchinson Carriers, 3d ed., Vol. II, sec. 757, pp. 839 and 840, and cases cited in footnote 1.

"**How right exercised.**—No particular form or mode has been held necessary in the exercise of this right, and it has been said that the vendor was so much favored in exercising it as to be justifiable in getting his goods back, by any means not criminal, before they reached the possession of an insolvent vendee. All that is required is some act or declaration of the vendor, or his agent, countermanding the delivery, and the usual mode is by a simple notice to the carrier, stating the vendor's claim, forbidding delivery to the vendee, or requiring that the goods shall be held subject to the vendor's orders. The vendor may, however, and sometimes does, resort to a possessory legal action, such as replevin or attachment, in the first instance, and takes the goods by legal process, either from the carrier himself or from some officer who has seized them for a debt of the vendee. Or resort may be had to a bill in equity, the jurisdiction of which to enforce the vendor's right of stoppage is said to be unquestionable."—Hutchinson Carriers, 3d ed., Col. II, sec. 758, page 840, and cases cited in footnotes 2 and 3.

"**Vendee must be insolvent—What constitutes insolvency.**—The vendor can only exercise this right against one who is insolvent or bankrupt, and whose insolvent condition, though it may then have existed, was not known to him at the time of the sale, but was afterwards discovered; and it would seem that the insolvency of the buyer, in order to justify the proceeding, must be evident. Goods cannot be arrested on their way to the purchaser because his ability to pay for them is doubtful, nor unless he is actually insolvent when they are

stopped. But what should be deemed sufficient evidence of 'insolvency' is a difficult question. It is a fact to be made out by proof, showing the inability of the vendee to meet his engagements, either by record or other evidence, such as a return of **nulla bona** upon an execution, the dishonor of negotiable paper, or a failure to meet other business engagements from inability to do so. By the word itself is meant a general inability to pay one's debts; and of this inability the failure to pay one just and admitted debt would probably be sufficient, and the fact that the consignee or buyer has 'stopped payment' has been considered, as a matter of course, to be such an insolvency as justified a stoppage **in transitu.**"—Hutchinson Carriers, 3d ed., Vol. II, sec. 761, pages 842 and 843, and cases cited in footnote 9.

"Duty and liability of carrier after notice.—The insolvency of the buyer is essential to the existence of the right of the vendor to stop the goods. If, therefore, the former be solvent at the time of its attempted exercise, the carrier, if he know the fact, will be not only justified in refusing to give up the goods or to pay attention to the notice, but it would be his duty to do so. He obeys the order or demand at his peril in any case. For, while a rightful stoppage protects the carrier against the claims of the consignee, yet if it should turn out that the purchaser of the goods was solvent, the notice or demand would be entirely without authority. If, therefore, the carrier refuse to give up the goods to the consignee, who is solvent, upon his demand, the latter might maintain an action of trover against him at once. If, on the other hand, the carrier fail to withhold the goods upon a notice to do so, or to surrender their possession to the vendor upon his demand, or if, after such notice or demand, he should deliver them to the buyer, and it should turn out that the latter was insolvent, the carrier will be liable to the vendor, at least to the extent of the buyer's indebtedness for the goods. It has, therefore, been said that, 'as the carrier obeys the stoppage **in transitu** at his peril, if the consignee be in fact solvent, it would seem no unreasonable rule to require that, at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act.' But in the case of The Tigress this suggestion is rejected, the judge saying that the proof of the conditions on which the vendor's rights depend would always be difficult, often impossible, at the time of their exercise; 'for instance, whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange for the goods becomes due; for it is, as I conceive, clear law that the right to stop does not require the vendee to have been found insolvent.'"—Hutchinson Carriers, 3d ed., Vol. II, sec. 773, pages 852 and 853, and cases cited in footnotes 39 to 43, both incl.

"Course to be pursued by carrier for his own protection.—The law of stoppage **in transitu,** therefore, becomes of great importance to the common carrier; and when a notice is given or a demand is made upon him for the goods by a vendor who claims the right to avail himself of it in the particular case, it places him in very nearly the same situation as when a demand is made for the goods by one who claims adversely to the bailor or his consignee. If it be doubtful whether the right exists to stop the goods, the carrier may, as in that case, instead of refusing to comply with the notice or the demand, require that he shall be allowed a reasonable time to investigate the

§ 24. Liability of Carrier Where Goods Are Seized Under Legal Process.

It is well established by weight of the authorities that where a carrier to whom goods have been entrusted for transportation is summoned as garnishee, and remains in possession of the goods, which have been attached as the property of a third party, the carrier's refusal to deliver the goods to the owner will not render him liable for a conversion.[67] But if a carrier accepts goods destined to a certain point and diverts them to some other point in another state, where such goods are attached, and the shipper loses his property, the carrier is held liable as for conversion.[68]

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condition of the buyer; and if, after inquiry, he shall be unable to satisfy himself, and does not choose to assume the responsibility of a delivery to either seller or buyer, or to act upon the demand of the vendor that the goods shall be withheld from the consignee, he may, for his own security, resort to legal proceedings to have the question determined, as in the case of adverse claimants of the property."—Hutchinson Carriers, 3d ed., Vol. II, sec. 775, page 854, and cases cited in footnote 45.

Black's Law Dictionary defines **stoppage in transitu** to be "the act by which the unpaid vendor of goods stops their progress and resumes possession of them, while they are in course of transit from him to the purchaser, and not yet actually delivered to the latter."

"The right of **stoppage in transitu** is that which the vendor has, when he sells goods on credit to another, of resuming the position of the goods while they are in the possession of a carrier or middleman, in the transit to the consignee or vendee, and before they arrive into his actual possession, or the destination he has appointed for them on his becoming bankrupt and insolvent."—2 Kent Comm. 702.

"**Stoppage in transitu** is the right which arises to an unpaid vendor to resume the possession, with which he had parted, of goods sold upon credit, before they come into the possession of a buyer who has become insolvent, bankrupt, or pecuniarily embarrassed."—57 N. H. 454. (From Black's Law Dict., tit. "Stoppage in Transitu.")

(67) Stiles vs. Davis, 66 U. S (1 Black) 101, 17 L. Ed. 33.

(68) Lincoln Grain Co. vs. Chicago, B. & Q. R. Co., 135 N. W. 443.

In Florence & Cripple Creek R. Co. vs. Radetsky, 122 Pac. 791, the court held that the consignor of goods is not entitled to maintain replevin for the recovery of the goods even though they have been taken from the carrier by constables, acting under a void writ.

See also: Automatic Merchandising Co. vs. Delaware, Hudson Co., 46 Pa. Super. Ct. 648.

But a carrier is not liable for loss entrusted to it for shipment, when such loss is occasioned by the seizure of the goods by an officer

Under the ruling of the Supreme Court of the United States, a seizure under legal process is a defense for the carrier in an action for nondelivery. But the carrier must give immediate notice to the consignee, for the mere seizure under valid process is not enough to excuse the carrier. If the carrier fails to give such notice, he becomes liable as in a case of delivery to a person other than his own bailee and assumes the burden of proving that the party seizing the goods under the process has the paramount title, unless the carrier can show that the consignee had actual knowledge from other sources in due time, to be equivalent to that notice he would have received if the carrier had not been negligent in the giving of such notice. And this is consonant with the rule laid down by the Supreme Court that common carriers and other bailees are not responsible to the owner of goods entrusted to them, nor to the holder of the bill of lading or other receipt for the same, when such goods are taken from the carrier or bailee by legal process.[69]

In Georgia a carrier is not relieved from the duty of delivering goods, even when he delivers them in response to legal process on demand of an officer of the law, unless such carrier has exercised due diligence to ascertain whether or not the process is in fact legal. But in Massachusetts it is no defense to an action against a common carrier for breach of his contract to deliver goods, that such goods were taken from him by an officer under levy of attachment against the person who was not the owner of the goods.[70]

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of the law under a prima facie valid authority.—Southern Ry. Co. vs. Heyman, 45 S. E. 491, 118 Ga. 616, reversed Heyman vs. Southern Ry. Co., 27 Sup. Ct. 104, 203 U. S. 270, 51 L. Ed. 178.

(69) Robinson vs. Memphis & C. R. Co. (C. C.), 16 Fed. 57; LeMont vs. New York, Lake Erie & Western R. Co. (C. C.), 28 Fed. 920; The Mary Ann Guest, Fed. Cas. No. 19197 (O. L. C.) 498.

(70) Georgia So. & F. Ry. Co. vs. Knight, 75 S. E. 823, 11 Ga. App. 489; Edwards vs. White Line Transit Co., 104 Mass. 159, 6 Am. Rep.

§ 25. Notice to Owner Where Goods Are Seized Under Legal Process.

As before stated, the law as laid down by the Supreme Court of the United States is that a seizure under legal process is a defense to the carrier in an action for non-delivery, but that the mere act of seizure is not enough to excuse the carrier. The carrier must give immediate notice to the consignee, and failing this, becomes liable as for delivery to another person than his own bailee. And this rule is generally enforced in the several states. In New York state the mere fact that a shipper of goods replevies them while in the carrier's custody and possession, does not relieve the carrier from liability to the consignee, unless he immediately notifies the consignee of the replevin action.[71]

213; Jonesboro, L. C. & E. R. Co. vs. Adams, 174 S. W. (Ark.) 527; Southern Exp. Co. vs. Sottile Bros., 67 S. E. (Ga.) 414; Automatic Merchandising Co. vs. Delaware & H. Co., 82 Atl. 939, 233 Pa. 581; Fehrenbach Wine & Liquor Co. vs. Atchison, T. & S. F. Ry. Co., 167 S. W. 631, 182 Mo. App. 1; Letts-Spencer Grocery Co. vs. Mo. Pac. Ry. Co., 122 S. W. 10, 138 Mo. App. 352.

(71) Robinson vs. Memphis & C. R. Co. (C. C.), 16 Fed. 57; Spiegel vs. Pacific Mail S. S. Co., 56 N. Y. S. 171, 26 Misc. Rep. 414; Ohio & M. Ry. Co. vs. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Furman vs. Chicago, R. I. & P. Ry. Co., 57 Iowa 42, 10 N. W. 272; Furman vs. Chicago, R. I. & P. R. Co., 81 Iowa 540, 46 N. W. 1049; Taugher vs. Northern Pac. Ry. Co., 129 N. W. 747.

CHAPTER X.

MEASURE OF DAMAGES.

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§ 1. General.

Out of the great number of decisions of the courts relating to the liability of the common carrier to his bailee have arisen a system of rules governing the adjustment or apportionment of damages as compensation for losses or injuries in actions at law against common carriers. The general doctrine is that in case of the loss of these goods, the common carrier is an insurer, and therefore responsible in damages for the value of the goods.[1]

§ 2. The Harter Act.

The regulation of bills of lading issued by water carriers taking cargoes from or between ports of the United States, is governed by the Harter Act of 1893.[1a] Section 1 of the

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(1) "In actions upon contract, it is a rule that only such damages are recoverable as are the natural and proximate consequence of the breach. They include direct damages, and such as the parties contemplated would be likely to result from a breach when the contract was made. Here an important distinction is to be noticed between the extent of responsibility for a tort and that for breach of a contract. The wrong-doer is answerable for all the injurious consequences of his tortious act which, according to the usual course of events and the general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated. But for breaches of contract the parties are not chargeable with damages on this principle. Whatever foresight, at the time of the breach, the defaulting party may have of the probable consequences, he is not generally held for that reason to any greater responsibility; he is liable only for the direct consequences of the breach; such as usually occur from the breach of such a contract, and as were within the contemplation of the parties, when the contract was entered into, as likely to result from a breach."—Sutherland on Damages I, p. 74.

(1a) Act of February 13, 1893, chap. 105, 27 Stat. L. 445.

Text of the Harter Act: "Section 1. That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document

Harter Act provides that in bills of lading issued by a water carrier operating from or between ports of the United States, any provision which exempts the carrier from liability for loss arising from negligence in loading, stowing, custody, care of or proper delivery of goods, is wrongful and void. Other provisions of the Harter Act make it unlawful to insert in such bill of lading an agreement whereby the obligation of the owner of the vessel, to use due diligence in properly equipping the vessel and making it seaworthy or whereby the obligation of the master or servant to carefully handle, stow and properly deliver the cargo, is abrogated. If the ship owner complies with the provisions of the Harter Act neither he nor the

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any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States or American and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence (to) properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

charterers of the vessel are held responsible for damage or loss resulting from faults or errors of navigation or in the management of the vessel. Having taken these precautions and established the required safeguards, the owners and charterers of the vessel are relieved from liability for losses arising from the dangers of the sea, acts of God, the public enemies, or the inherent defect, quality or vice of the goods, or from inefficiency of package, or seizure under legal process, or for loss resulting from any act of omission of the shipper or owners of the goods, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

The Harter Act relates only to the relations between a vessel and her cargo and not to the liability of one vessel to other vessels with which it may collide.[2]

The Harter Act applies to all vessels transporting property from or between any ports of the United States situated upon any navigable waters, inland or otherwise, subject to the jurisdiction of the federal government.[3]

The words, "to or from any port of the United States," applies to shipping on the Great Lakes.[4]

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(2) The Viola, 60 Fed. 296; The Viola, 59 Fed. 632; The Berkshire, 59 Fed. 1007.

"In relieving the carrier vessel and her owners from their responsibility for their half of the damage to the cargo, the act was not designed to increase thereby the damage payable in said cases by the other vessel. Nor does the act affect the operation of the equitable rule which gives priority to the claim of the innocent cargo owner or to that of the vessel owner against the fund available for the payment of damages to same through a collision for which both vessels have been adjudged in fault."—Hutchinson Carriers, 3d ed., Vol. I, sec. 387, page 399, and cases cited in footnotes 15 and 16.

(3) **In re** Piper Aden Goodall Co., 86 Fed. 670.

(4) The E. A. Shores, Jr., 73 Fed. 342.

"The act will also be applied to foreign vessels in suits brought in the United States, and when the vessel owner sets up the act, he must take the burdens with the benefits, and cannot claim a greater limitation of liability under the terms of a bill of lading."—Hutchinson Carriers, 3d ed., Vol. I, sec. 347, page 366, and cases cited in footnote 12.

In exercising "due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied," the owner of the vessel is responsible for the act of his agents.[5]

§ 3. Measure of Damages for Failure of Carrier to Accept and Carry.

At common law it is the duty of a common carrier to accept and carry goods tendered to it when such goods are of the class and kind it professes to carry, but this same duty may arise upon express contract made by the carrier in that behalf.[6]

The measure of damages in an action against the common carrier for failure or refusal to accept and carry goods, is the difference between the value of the property where it was tendered to the carrier and its market value at the destination to which it would have been carried had the carrier performed its common law obligation to receive and carry, or its duty when the same arises in contract.[7]

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[5] Nord-Deutscher Lloyd vs. President, etc., of Ins. Co., 110 Fed. 420, 49 C. C. A. 1, **affirming** Insurance Co. vs. Nord-German Lloyd Co., 106 Fed. 973; International Nav. Co. vs. Farr & Bailey Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 Sup. Ct. T. 591, **affirming** Farr & Bailey Mfg. Co. vs. International Nav. Co., 98 Fed. 636, 39 C. C. A. 197.

The Colima, 82 Fed. 665; The Flamborough, 69 Fed. 470; The Alvena, 79 Fed. 974, 25 C. C. A. 264, **affirming** 74 Fed. 252; The Mary L. Peters, 68 Fed. 919, **affirmed** in 79 Fed. 998, 25 C. C. A. 681, 26 U. S. App. 784; The Manitoba, 104 Fed. 145.

[6] Missouri, etc., Ry. Co. vs. Webb, 20 Tex. Civ. App. 438, 49 S. W. Rep. 526.

[7] Bridgman vs. Steamboat Emily, 18 Iowa 509; Brackett vs. McNair, 14 Johns. 170; McGovern vs. Lewis, 56 Penn. St. 231; Armory vs. McGregor, 15 Johns. 24; O'Connor vs. Forster, 10 Watts 418; Bell vs. Cunningham, 3 Fed. 69.

See also People vs. New York, L. E. & W. R. Co., 22 Hun 533; Houston & T. C. Ry. Co. vs. Smith, 63 Tex. 322; Avinger vs. South Carolina Ry. Co., 29 So. Car. 265, 7 S. E. 493, 13 Am. St. Rep. 716.

In Texas it has been held that the measure of damages for refusal to accept and carry goods is the loss occasioned by the delay and the cost of keeping the goods during the delay.—Houston & T. C. Ry. Co. vs. Smith, 63 Tex. 322.

"But if the owner of the goods can procure other means of con-

If the refusal of a railway company to carry goods is occasioned by its ill-will, or in wilful disregard of the rights of the person or party offering them, exemplary damages[8] may be given.[9]

§ 4. Measure of Damages for Delay.

The measure of damages recoverable from a common carrier in case of delay in transportation or delivery, is the difference between the market value of the goods "at the place and time of shipment" and the market value of goods upon their actual arrival at destination, plus the amount of freight charges that may have been paid. This

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veyance it would be his duty to do so, and, in that case, the carrier could not only be charged with any excess in the cost of the shipment above the price for which, according to his contract, it was to have carried them, and such loss occasioned by the delay, if any, as might be its reasonable and natural consequence, or as he must know from the circumstances or from the information given him by the owner of the goods would be the result of his breach of the contract. If, however, the carrier should demand of the owner of the goods a higher rate of freight than that to which they have previously agreed, and the rate demanded is not unreasonable; the owner cannot, on account of the higher rate demanded, refuse to ship the goods and thereby subject the carrier to liability for loss of profit arising from his inability to perform certain collateral contracts, although the carrier may have been informed of the nature and terms of such contract. The duty of the owner, under such circumstances, would be to ship the goods and pay the rate demanded, and he would then be entitled to sue and recover the difference between the rate charged and that agreed upon in the contract.

"The question of the right to recover damages for the failure to accept and carry goods intended for a special use, and for the loss of profits resulting from such failure, depends upon the same consideration as those already referred to in action for damages caused by the carrier's delay."—Hutchinson Carriers, 3d ed., Vol. III, sec. 1370, pp. 1633 and 1634, and cases cited in footnotes 50 to 52, both incl.

[8] **Exemplary Damages.** Exemplary or punitive damages, which are damages given by way of punishment, example or vindication, are awarded by the courts in respect of tortious acts, committed through malice or other circumstances of aggravation; damages designed not only as a compensation to the injured party, but also as a punishment to the wrong-doer for his violence, oppression, malice, or fraud.—Black's Law Dict., tit. "Exemplary Damages," and "Punitive Damages."

[9] Avinger vs. So. Carolina Ry. Co., 29 So. Car. 265, 7 S. E. 493, 13 Am. St. Rep. 716.

determination of the value of the goods differs from the rule as it formerly stood at common law, for then the measure of damages for delay for which the carrier was liable was the difference between the market value of the goods "at the time and place at which the delivery should have been made and the same value when delivery was actually made."[10] The present measure of damages arises out of the conclusive effect given to provisions in bills of lading under federal and state regulation.

A bill of lading is both a receipt for the goods delivered to the carrier and a contract for their carriage. As a contract of carriage, the bill of lading provides for the safe carriage of the goods and their delivery to the consignee or his order at destination. To the extent that the bill of lading is a contract, and a condition of the lawfully published tariffs of the carrier, its provisions cannot be explained, varied, added to, altered or contradicted by parol evidence. The recitals in the bill of lading as to the receipt of goods, quantity, condition, ownership, rate or destination, are merely prima facie evidence of the facts that they purport to admit. Such admissions may be rebutted by other circumstances connected with the transaction. So it has been held that a stipulation in a bill of lading that goods are to be transported without unnecessary delay cannot be altered by proof of a parol agreement that the goods should be forwarded on the night of the day of their receipt by the carrier.[11]

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[10] See American & English Encyl. of Law, Vol. V, "Carriers of Goods," cases cited in footnote 5 to page 384.

[11] Indianapolis & C. R. Co. vs. Remmy, 13 Ind. 519.

It has been held in New York state that a shipper accepting a bill of lading without objection, and stipulating that the carrier is not to be liable for loss occasioned by delay, is without right of recovery for failure to transport in a certain time, as agreed on by parol before the bill of lading was executed, the court holding that parol evidence was inadmissible to vary the terms of the bill of lading.—Hill vs. Syracuse, Buffalo & N. Y. R. Co., 73 N. Y. 351, 29 Am. Rep. 163, reversing 8 Hun 296.

And this measure was applied whether the difference in value was the result of a decline in the market or of an injury suffered by the goods in consequence of the delay.

The uniform bill of lading now in vogue generally in connection with railway carriage of goods in the United States provides that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid," and that "no carrier is bound to transport such property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement endorsed hereon."

It was immaterial under the former rule whether the carrier had undertaken especially to deliver by a fixed date or not, that being a matter of affecting the liability of the carrier and not the amount of the damages.[12]

It must be borne in mind in connection with the above statements of the rules pertaining to the measure of damages for delay that such damages as are recoverable therefor must be the proximate consequences of the delay, "and where it appears that such damages are nominal merely, no recovery for a greater sum can be sustained although injuries resulting from other causes may be shown."[13]

Delays for which the carrier is liable in the carriage and delivery of goods are often the cause of additional expenses and losses, and the question of the owner's right

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[12] Chicago, etc., R. Co. vs. Phratt, 5 Ill. App. 502; Cutting vs. Grand Trunk R. Co., 13 Allen (Mass.) 381; Columbus, etc., R. Co. vs. Flournoy, 75 Ga. 745.

[13] American & Eng. Encyl. of Law, Vol. V, "Carriers of Goods," page 387, citing Detroit, etc., R. Co. vs. McKenzie, 43 Mich. 609, 9 Am. & Eng. R. Cas. 15; Baldwin vs. London, etc., R. Co., 9 Q. B. Div. 582; Missouri Pac. R. Co. vs. Paine, 1 Tex. Civ. App. 621.

of recovery of such incidental expenses and losses becomes important. The rule is best stated by Hutchinson on Carriers as follows:

> "It may be stated, therefore, as the well settled rule, that special damages can be recovered from the carrier when the transportation has been delayed, or where it is shown that the shipper informed the carrier, at the time the contract was made, of the special circumstances requiring expedition in the shipment. And although the carrier may have been notified of such special circumstances in time to have prevented a delay, if such notice was given after the contract of transportation had been entered upon, it would not operate to modify the contract, or subject the carrier to liability for special damages arising from a subsequent delay. The fact that the carrier was notified of the special circumstances demanding greater diligence is thus seen to be a crucial one, and that the carrier was so informed must be both alleged and proved."[14]

In summary, therefore, the rule should be stated that the owner of the goods, or other person entitled to recover thereon, may recover from the carrier damages for delay in the transit and delivery of goods (1) the difference in market value[15] at the place and time of shipment and at the time of arrival of the goods, with interest from that

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(14) Hutchinson Carriers, 3d ed., Vol. III, sec. 1367, pages 1622 to 1626, and cases cited in footnotes 34 to 36, both incl.

(15) The "market value" means the current price prevailing in that portion of the country in which the shipment moves, and has reference to the average price ranging through a reasonable period of time and to not any unusually depressed or inflated price as the result of special or local conditions.—American & English Encyl. of Law, Vol. V, "Carriers of Goods," page 374, citing Smith vs. Griffith, 3 Hill (N. Y.) 333, 38 Am. Dec. 639; Sisson vs. Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252; South, etc., R. Co. vs. Woods, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634; Echols vs. Louisville, etc., R. Co., 90 Ala. 366, 42 Am. & Eng. R. Cas. 454; Blumenthal vs. Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Illinois Central R. Co. vs. Hall, 58 Ill. 409, 11 Am. Ry. Rep. 95.

time when the goods should have arrived,[16] (2) incidental damages naturally and proximately flowing from the delay, such as expenses or trouble "in making further applications or journeys to get the goods,[17] or in searching for them,[18] or in caring for them after their arrival until the next market day,[19] or in making reasonable effort to avert the loss or make it as light as possible,[20] or in sending them elsewhere to find a market for them,"[21] (3) spe-

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[16] The time "when the goods should have arrived" is the time fixed by the contract, if any, and if not, then a reasonable time.—Hutchinson Carriers, 3d ed., Vol. III, sec. 1366, page 1619, citing Columbus, etc., Ry. Co. vs. Flournoy, 75 Ga. 745.

Interest on the value of the goods for the length of time they are delayed is recoverable as damages.—Murrell vs. Dixey, 14 La. Ann. 298; Smith vs. Whitman, 13 Mo. 352; Laurent vs. Vaughn, 30 Vt. 90; East Tennessee, etc., R. Co. vs. Johnson, 85 Ga. 497; Woodward vs. Illinois Cent. R. Co., 1 Biss. (U. S.) 447.

[17] Hutchinson Carriers, 3d ed., Vol. III, sec. 1366, pp. 1619 and 1620, and cases cited in footnotes 24 to 28, both incl.

Waite vs. Gilbert, 10 Cush. 177; Demming vs. Railroad Co., 48 N. H. 455; Davis vs. Railroad Co., 1 Bisney 23; Murrell vs. Express Co., 54 Ark. 22, 14 S. W. Rep. 1098.

[18] Farwell vs. Davis, 66 Barb. 73; Chicago, etc., Ry. Co. vs. Sanbro, 87 Ill. 195.

[19] Ayres vs. The Railroad, 75 Wis. 215; Cleveland, etc., R. Co. vs. Strong, 56 Ill. App. 604.

[20] Laurent vs. Vaughn, 30 Vt. 90; Shelby vs. The Railway, 77 Mo. App. 205; Railway Co. vs. Daggett, 87 Tex. 322, 28 S. W. Rep. 525, reversing (Tex. Civ. App.) 27 S. W. Rep. 186.

[21] "If, by reason of a delay, there is no market value for the goods at the place of destination, and in consequence they are shipped to another market, the measure of damages will be the difference in value on the market at destination in the condition and at the time they should have arrived and the sum they were sold for on the other market."—Hutchinson Carriers, 3d ed., Vol. III, sec. 1366, page 1620, citing Texas, etc., Ry. Co. vs. Coggin, 90 S. W. Rep. 523; Clark vs. American Express Co., 106 N. W. Rep. 642.

From **American & English Encyl. of Law, Vol. V, "Carriers of Goods,"** page 386. **Other Expenses Recoverable.**—Sangamon, etc., R. Co. vs. Henry, 14 Ill. 156; Rankin vs. Pacific R. Co., 55 Mo. 167; Briggs vs. New York Cent. R. Co., 28 Barb. (N. Y.) 515; Baltimore, etc., R. Co. vs. O'Donnell, 49 Ohio St. 489; Nettles vs. South Carolina R. Co., 7 Rich. L. (S. Car.) 190, 62 Am. Dec. 409.

Expenses of Search for Goods.—The consignee is entitled to recover, as part of the damages, the expense incurred by him in a necessary search for the goods delayed. Savannah, etc., R. Co. vs. Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92, 28 Am. & Eng. R. Cas. 57. But in the case of Hales vs. London, etc., R. Co., 4 B. & S. 66, 116 E. C. L. 66, it is held that the personal expenses of the consignee in

inquiring for his goods cannot be considered as part of the damages and are not recoverable; and in Woodger vs. Great Western R. Co., L. R. 2 C. P. 318, it is held that the consignee's hotel expenses while waiting for the goods are not recoverable as part of the damages. **Compare** Black vs. Baxendale, 1 Exch. 410.

In St. Louis, etc., R. Co. vs. Mudford, 48 Ark. 502, 32 Am. & Eng. R. Cas. 539, which was an action to recover for a delay in delivery of goods shipped by the plaintiff from Texarkana to Cincinnati, the plaintiff sought to show that he had gone to Texarkana several times to search for and look after the delayed goods. It was held that he was not entitled to recover the expenses of such trips, since the goods had been shipped to Cincinnati, and that was the place where they were to be looked for.

Expense of Litigation.—Where the carrier is compelled to institute an action to recover the shipper's goods from a wrong-doer who undertook to appropriate them, and recovers the value of the goods, it is liable to the shipper for the full value of the goods and is not entitled to deduct the expenses incurred by it in the litigation. Hardman vs. Brett, 37 Fed. Rep. 803.

Loss of Market—Expense of Keeping Cattle Until Next Market Day.—Where it appears that the live stock shipped by the plaintiff should have arrived in time for the Thursday market, but did not actually arrive until Friday evening, and there was no market at which they could have been sold on Saturday, the plaintiff may recover for the shrinkage in value and the decline in the market price, together with the expense of keeping the cattle from Thursday until the following Monday. But if the stock might have been sold on Saturday, there can be no recovery for such depreciation or expense of keeping beyond that day. Ayres vs. Chicago, etc., R. Co., 75 Wis. 215, 40 Am. & Eng. R. Cas. 108.

The Cost of Keeping Live Stock, caused by a delay, is an element of damage. Gulf, etc., R. Co. vs. Hume, 87 Tex. 211.

But the amount recoverable is not the actual expense, but the difference between the expense of keeping them at the point where they are delayed and that of keeping them at home. See Armstrong vs. Missouri Pac. R. Co., 17 Mo. App. 403.

Consignee's Loss of Time in Waiting.—In the absence of special circumstances shown to have been known to the carrier, the consignee is not entitled to recover damages for the loss of time by him while waiting for the goods to arrive, and evidence relating to such loss of time is incompetent. Ingledew vs. Northern R. Co., 7 Gray (Mass.) 86; Denver, etc., R. Co. vs. De Witt, 1 Colo. App. 419.

Expense of Teams.—In Gulf, etc., R. Co. vs. Loonie, 84 Tex. 259, it was held that the expense of wagons and teams sent for freight which was not delivered may be recovered if the freight is wrongfully withheld; but in such a case the expense of only one trip by the wagons and teams is properly recoverable.

The recovery of such expenses seems to be confined to cases where the freight is wrongfully withheld. Thus, where the owner of goods sues for a delay in transportation, he cannot recover for the time and expense of a wagon and team and driver while waiting for the arrival of the goods, it not appearing that the carrier, at the time of the shipment, had notice that a wagon would be in waiting to

cial damages where notice of special circumstances have been given to the carrier when contract of affreightment is made,[22] and (4) exemplary or punitive damages when

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receive the goods. Briggs vs. New York Cent. R. Co., 28 Barb. (N. Y.) 515.

When Delay Results from Goods Being Sent to Wrong Station, the shipper or consignee is entitled to recover, in addition to the difference in the market values as above stated, the freight charges from the wrong destination to the proper one. Monteith vs. Merchants' Despatch, etc., Co., 1 Ont. Rep. 47. See also Galena, etc., R. Co. vs. Rae, 18 Ill. 488, 68 Am. Dec. 574.

Where Owner's Acceptance of Stock is Delayed.—In Louisville, etc., R. Co. vs. Trent, 16 Lea (Tenn.) 419, suit was brought to recover damages for injury to horses shipped by rail to S. The owner, for two days, refused to receive the horses at S., owing to a misunderstanding about some extra charges. It was held that the owner could not recover the expense of keeping the horses for those two days; the measure of damages was the extent of the injury suffered up to the time the horses were received at S., and no expenses thereafter incurred were chargeable to the carrier.

(22) **From Hutchinson Carriers, 3d ed., Vol. III, sec. 1368, pages 1626 and 1627.—"Notice Given After Contract to Carry Has Been Performed.**—It has already been seen that even though the carrier, after the contract for carriage has been made, is informed of the special circumstances requiring expedition in the shipment in time to prevent a delay, such notice cannot subject him to liability for special damages arising from a subsequent delay; and the reason for this rule is said to be that such a notice, if allowed to be made the basis of special damages, would impose an additional liability upon the carrier, resulting from the contract itself, not contemplated by the parties when the contract was made. Where, however, notice of such circumstances as will occasion special damages is given the carrier after the contract to carry has been performed, and after the goods have accordingly arrived at their destination and are ready to be delivered, he will be liable for such special damages if he negligently fails to make a delivery of the goods."

"Damage for Delay in Transporting Articles Intended for Use in Business.—If an article is intended for use in business at destination, and the carrier unreasonably delays its transportation, the owner cannot recover for the loss of its use during the delay, or the profits which he would thereby have made if it had been seasonably delivered, unless he alleges and proves that the carrier, at the time the contract for its transportation was made, was informed of the special use to which it was to be put."

From American & English Encyl. of Law, Vol. V, "Carriers of Goods," page 385.—Where Special Contract Fixes a Penalty for Delay.—"In the case of Nudd vs. Wells, 11 Wis. 407, the contract of shipment provided that if the goods were not delivered in ten days the carrier would remit five cents per hundred pounds from the freight charges for every day's delay thereafter. It was held that the contract must be taken as referring to a temporary delay merely,

delay is the result of the ill-will of the carrier or its wilful disregard of the owner's rights.[23]

Mere delay is not a conversion.[24]

Where delay results from goods being forwarded by the carrier to the wrong destination, the owner of the goods may recover in addition to the difference in market value, the freight charges from the erroneous destination to the right one.[25]

In the case of damages to live stock because of delay for which the carrier is liable, not only may the difference in market values be recovered but also the loss occasioned by the shrinkage in weight of the cattle due to the delay.[26]

§ 5. Measure of Damages for Loss.

As in the case of the measure of damages for delay, the rule for determining the amount recoverable for loss of the goods by the carrier has been changed from the standard of market value at destination to market value

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the penalty for which would be limited to the amount of the freight charges, and did not embrace a case where there was an entire failure to deliver.

Mere Delay Not a Conversion.—A consignee has no right, merely because there was an unreasonable delay, to refuse to receive the goods, and sue for their entire value. St. Louis, etc., R. Co. vs. Mudford, 44 Ark. 439, 21 Am. & Eng. R. Cas. 139; Briggs vs. New York Cent. R. Co., 28 Barb. (N. Y.) 515.

Interest.—Interest on the value of the goods for the length of time they are delayed is recoverable as damages. Murrell vs. Dixey, 14 La. Ann. 298; Smith vs. Whitman, 13 Mo. 352; Laurent vs. Vaughn, 30 Vt. 90; East Tennessee, etc., R. Co. vs. Johnson, 85 Ga. 497; Woodward vs. Illinois Cent. R. Co. 1 Biss. (U. S.) 447. See **supra,** this section, **Interest.**

[23] Id.

[24] Id.

[25] Monteigh vs. Merchants' Despatch, etc., Co., 1 Ont. Rep. 47; Galena, etc., R. Co. vs. Rae, 18 Ill. 488, 68 Am. Dec. 574.

[26] Sturgeon vs. St. Louis, etc., R. Co., 65 Mo. 569; Illinois Cent. R. Co. vs. Simmons, 49 Ill. App. 443; Douglas vs. Hannibal, etc., R. Co., 53 Mo. App. 473; Gulf, etc., R. Co. vs. Hume, 6 Tex. Civ. App. 653; Ayers vs. Chicago, etc., R. Co., 75 Wis. 215, 40 Am. & Eng. R. Cas. 108.

at the place and time of shipment. The Cummins Amendment to the Act to Regulate Commerce places upon interstate carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with the Interstate Commerce Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily at the time and place of shipment. It is therefore the rule, so far as affected by the uniform or other form of bill of lading made part of the tariffs of the carriers filed in accordance with the requirements of the federal and state regulating authorities, that the liability of the carriers may be limited to the full value of the property so classified and established as of the time and place of shipment.[27]

The common law rule made the carrier liable for the value of the property at the place of destination and for actual damages to same. The rigor of the common law liability of a carrier, it has been held by the courts, may be modified by the carrier through any fair, reasonable, and just agreement with the shipper.[28]

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(27) The Cummins Amendment, 33 I. C. C. 682, 689.

(28) Cau vs. T. & P. Ry. Co., 194 U. S. 427; Adams Exp. Co. vs. Croninger, 226 U. S. 491; Kansas City Co. Ry. Co. vs. Carl, 227 U. S. 639; Coleman vs. New York, N. H. & Hartford R. Co., 215 Mass. 45. See also Shaffer vs. C., R. I. & P. Ry. Co., 21 I. C. C. 8.

The provision of the bill of lading above referred to fixes as the measure of damages for which any carrier shall be liable in the case of the loss of the goods, the invoice value of the property at the place and time of shipment plus freight charges, if paid.[29]

§ 6. Measure of Damages for Injury to Goods.

The measure of damages for injury to goods in the possession of a common carrier for carriage and delivery, is the difference between the value of the goods as actually delivered and their value at the place and time of shipment, with interest. Again, the common law rule has been changed, for at the common law the measure of damages for injury to goods was the difference between the value of the goods as actually delivered and their value as they should have been delivered at destination. In addition to the difference in values, damages may be recovered for losses proximately resulting from the injury, reasonable expenses in seeking to reclaim the goods, or for restoring the goods to their former condition, or for endeavoring to reduce the loss to the least amount, and for freight charges, if paid.

If the entire value of the injured goods is destroyed thereby, the consignee may refuse to receive and sue for their full value. A consignee is not justified at common law to refuse to accept goods and hold the carrier responsible, where the goods are injured during their carriage or before delivery from causes for which the carrier is responsible.[30] So the consignee should ordinarily accept

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(29) Larkin Co. vs. E. & W. Transp. Co., 34 I. C. C. 106, 109.

(30) Hutchinson Carriers, 3d ed., Vol. III, sec. 1365, pp. 1616 and 1617, and cases cited in footnotes 14 to 19, both incl.

As a general rule, the doctrine that where goods are injured the owner may abandon them as for a total loss and sue for their value does not apply to contracts of affreightment. The fact, therefore, that the goods are injured upon the journey, through causes for

the damaged goods, sell them at the best price he can get, deduct such amount from their value, and hold the carrier responsible for the balance of the loss. And only in such cases where the value of the injured goods is so small that the expense of salvage would equal or exceed such value, should the consignee decline to receive them and sue for their full value as in a case of entire loss of the goods.[31]

§ 7. Measure of Damages for Conversion.

The rule of the common law fixing the measure of damages for conversion of property in the hands of a common carrier for carriage and delivery has not been tempered as in the case of loss of or injury to the goods. The measure of damages for conversion of goods is their value at destination, with interest, less cost of transportation.[32]

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which the carrier is responsible, does not of itself justify the consignee in refusing to receive them, but he must accept them and hold the carrier responsible for the injury. Where, however, the damage is such that the entire value of the goods is destroyed, the consignee may refuse to receive them and sue the carrier for their value. Thus where a patented machine, while being transported from the manufacturer's, was so injured as to be practically worthless and to cost as much to repair it as to buy a new one, it was held that the consignee was justified in refusing to receive it, and might recover from the carrier the value of the machine and the amount paid for carriage with interest from the time when it should have been allowed. But where one of a number of boxes shipped was missing, it was held that the consignee was not justified in refusing to receive the balance, but was bound to accept them and hold the carrier for the missing portion.

So where the consignor, who was also the consignee, sent goods forward in sealed cars with directions, "Notify J. W. Sharp," and the carrier permitted an unauthorized examination of the goods at destination by J. W. Sharp's agent, whereby they were refused, it was held that the carrier's wrongful act furnished no basis for an action for their value.—Hutchinson Carriers, 3d ed., Vol. III, sec. 1365, pp. 1616 and 1617, and cases cited in footnotes 14 to 19, both incl.

(31) McGrath Bros. vs. C. & N. W. Ry. Co., 91 S. C. 552, 75 S. E. 44.

(32) Hutchinson Carriers, 3d ed., Vol. III, sec. 1374, pp. 1639 and 1640, and cases cited in footnotes 9 to 16, both incl.

"Delay on the part of the carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable

for their value; and so long as the goods remain in specie, however much they may be depreciated in value, the consignee or owner must receive them when tendered, can recover from the carrier only the damages which he has sustained by the delay. And a voluntary acceptance of the goods, when there has been an inexcusable delay on the part of the carrier in their delivery, will not preclude the owner from a recovery of whatever damages he may have sustained thereby. Nor will the carrier be guilty of a conversion of the goods where a delivery of them was refused by an agent because of his understanding that they could be held for demurrage charges, where such agent at once conferred with his superior who instructed the agent to deliver the goods, and such instruction was communicated to the owner before suit was brought. So a theft or loss of the goods through the mere non-feasance of the carrier will not render him liable in an action for their conversion."—Hutchinson Carriers, 3d ed., Vol. III, sec. 1372, pp. 1638 and 1639, and cases cited in footnotes 4 to 7, both incl.

CHAPTER XI.

CARRIERS OF LIVE STOCK.

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CARRIERS OF LIVE STOCK.

§ 1. Legal Distinctions.

The term "carriers of live stock" means all carriers who profess and undertake the carriage of live stock for hire.[1] Carriers of live stock are common carriers and must assume and discharge all of the responsibilities and duties of common carriers of goods and are entitled to all the rights and privileges of such carriers. The distinction in law which is made as to carriers of live stock, arises out of the rule of common law that carriers of goods are not liable for losses occurring through the inherent defect, quality, vice, or character of the goods carried.[2]

In most of the states railroad common carriers are required by statute to receive and carry all personal property, which, of course, includes live stock. Such statutory obligation, or in its absence a profession by the carrier to accept and carry live stock when properly tendered, would render such common carriers liable for refusal to receive and carry live stock, the same as in the case of carriers of goods.

§ 2. Carriers of Live Stock Required to Furnish Facilities.

Like a common carrier of goods, a carrier of live stock must upon demand furnish cars in proper condition to receive and transport live stock safely to its destination.[3]

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(1) American Merchants' Union Exp. Co. vs. Phillips, 29 Mich. 515; Honeyman vs. Oregon, etc., R. Co., 13 Ore. 52, 57 Am. Rep. 20; Central R. Co. vs. Pickett, 87 Ga. 734.

(2) American & Eng. Encyl. of Law, Vol. V, "Carriers of Live Stock," page 428, cases cited in footnote 3.

(3) See "Carriers of Goods," cases cited under section devoted to obligation of common carriers to furnish cars, **ante.**

"The carrier is bound to furnish good and sufficient stock pens and yards at its depot for the shipment of cattle and other live stock, and such other facilities as may be necessary for the safe and convenient loading of the stock. The shipper is entitled to recover for all damages sustained by his property in consequence of a failure by the carrier to furnish such facilities or to keep them safe, and the carrier cannot be relieved from such liability by showing that the shipper saw the stock pens or knows of the defects in them."[4]

In some of the states the character of cars required to be furnished by carriers for shipments of live stock is prescribed by statute.[5]

It is the general doctrine of the law that cars furnished for live stock shipments must be suitable and safe, which means such cars shall not only be safe as originally furnished, but must be kept so during the period of their use in performing the contract of carriage.[6] But if the shipper makes his own selection of cars, he will be presumed to have full knowledge of their defects, and by his selection assumes the risks of such defects. This rule is strictly enforced by the courts against the carrier.[7]

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(4) American & Eng. Encyl. of Law, Vol. V, "Carriers of Live Stock," pages 430 and 431, and cases cited in footnotes 4 and 5 to page 430, and 1 and 2 to page 431.

(5) Emerson vs. St. Louis, etc., R. Co., 111 Mo. 161, following Revised Stat. of Mo. 1889, secs. 2598-2600.

(6) Root vs. New York, etc., R. Co., 83 Hun (N. Y.) 111.

"The carrier is not bound to furnish the safest or most improved car in use or the best appliances; it is enough that they are reasonably safe and are suitable for the purposes for which they are furnished. The fact that the cars used are those which the carrier has always used is no defense where they are not suitable."—American & Eng. Encyl. of Law, Vol. V, "Carriers of Live Stock," page 433, and cases cited in footnotes 1 and 2.

(7) The carrier can only be relieved from liability by the shipper's acceptance of cars where it appears that the shipper was fully informed of the defects, the risk of which he assumed. The shipper will not be held to have assumed any risks not clearly apparent and of which

Under the circumstances of a particular case the shipper must prove a car furnished him for the shipment of his stock to have been defective without his knowledge, although it is a reasonable rule which requires the shipper to inspect a car for visible defects before loading the stock.

Where a carrier undertakes to furnish bedding, the material used for bedding must be such as not to cause injury to the stock.[8]

§ 3. Carrier's Duty During Transportation.

Because of the inherent quality and vice of live stock, common carriers undertaking their carriage are under the duty of affording the stock the necessary care and attention to prevent injury thereof. The carrier is required to feed and water live stock during the journey at proper intervals, unless it has specifically contracted not to do so. And where necessary, the carrier must furnish the required facilities in suitable and safe condition to unload the stock for the purpose of feeding and watering.[9]

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he is ignorant.—Am. & Eng. Encyl. of Law, Vol. V, "Carriers of Live Stock," page 435, and cases cited in footnote 3.

"The carrier is bound to provide a car reasonably suitable for the conveyance of live stock tendered for transportation, and if it accepts a defective car from a connecting line in which the stock were originally loaded, and hauls it on to its destination on its own line, it is liable for a loss resulting from the defects of such car, and cannot plead its defense to the fact that the car belonged to and was furnished to the shipper by another company."—Am. & Eng. Encyl. of Law, Vol. V, "Carriers of Live Stock," page 436, and cases cited in footnote 1.

[8] While the circumstances of a particular case may create such a duty, the carrier ordinarily is not necessarily guilty of negligence in failing to supply bedding. But if the carrier does undertake to supply bedding, the material supplied must be of a kind not likely to occasion injury.—East Tennessee R. Co. vs. Johnston, 74 Ala. 596, 51 Am. Rep. 489; Atchison vs. Chicago, etc., R. Co., 80 Mo. 213; Powell vs. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564.

[9] Toledo, etc., R. Co. vs. Hamilton, 76 Ill. 393; Illinois Cent. R. Co. vs. Adams, 42 Ill. 474, 92 Am. Dec. 85; Dunn vs. Hannibal, etc., R. Co., 68 Mo. 268; Gulf, etc., R. Co., vs. Wilhelm (Tex. App. 189),

The statute of the United States provides a penalty for keeping cattle confined in a car for a period of more than 28 consecutive hours without unloading for a period of five hours for rest, feed and water, the carrier being liable to the owner of the stock for all damages resulting for failure so to do, in addition to the statutory penalty. This statute applies only to live stock in interstate movements.[10]

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16 S. W. Rep. 109; Abrams vs. Milwaukee, etc., R. Co., 87 Wis. 485, 41 Am. St. Rep. 55; Toledo, etc., R. Co. vs. Thompson, 71 Ill. 434; Harris vs. Northern Indiana R. Co., 20 N. Y. 233; Cragin vs. New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Taylor, etc., R. Co. vs. Montgomery, 4 Tex. App. Civ. Cas. sec. 237 (Tex. App. 1891), 16 S. W. Rep. 178; Galveston, etc., R. Co. vs. Williams (Tex. Civ. App. 1894), 25 S. W. Rep. 311.

From American & Eng. Encyl. of Law, Vol. V, "Carriers of Live Stock," page 437.—**"Duty in Other Respects—Excessive Heat—Overcrowding.**—The carrier, in addition to affording live stock food, water, and rest, is bound to take all such other precautions for their safe transportation as reasonable prudence would suggest.

"To Prevent Injury from Excessive Heat.—Where hogs are being carried and are in danger of becoming overheated, the carrier must throw water on them to prevent the danger.

"To Prevent Stock from Injuring One Another.—It must keep a reasonably careful watch over the stock during the entire journey, to prevent their injuring each other or themselves by "piling up," or crowding, or in other ways.

"Summary—General Duty of Supervision.—In short, the carrier is bound to exercise all the care which a reasonably prudent man would exercise in the care of his own stock while they were being transported.

"Where Duty Assumed by Shipper—Opportunity and Facilities to Be Afforded.—If this duty of caring for the stock is assumed by the shipper, he must be afforded reasonable opportunity and facilities for attending to them properly.

"Unloading Temporarily for Rest.—Whenever, in the course of the transportation, the safety of the animals requires that they be unloaded temporarily for rest or in order to be differently loaded, it is the carrier's duty to side-track the car and either unload the car or afford the shipper opportunity for doing so. In the manner of unloading, and in the time and manner of reloading, the same duties exist as when the cattle are originally loaded or are being unloaded at their destination."

(10) Act of June 29, 1906, 34 U. S. Stats. at L. 607.—**"Animals—Time Limit Confinement on Cars, Etc.**—That no railroad, express company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed

from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement the time consumed in loading and unloading shall not be considered but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, That it shall not be required that sheep be unloaded in the night time, but where the time expires in the night time in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

"**Feeding at Expense of Owner—Lien.** Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

"**Penalty.** .Sec. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: Provided, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

"**Prosecutions.** Sec. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the

§ 4. Liability of Carriers of Live Stock.

The liability of carriers of live stock begins when the stock is placed in its pens to await loading into the cars.[11]

The only exemption from absolute liability for loss or injury to live stock enjoyed by carriers thereof, is from such losses or injuries as occur through the "proper vice" of the stock being carried.[12] And carriers of live stock are as much insurers of the animals they transport as common carriers of goods are of the property which they carry. Where the carrier is excused for liability for loss

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United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

"**Repeal.** Sec. 5. That section forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed."

See also Nashville, etc., R. Co. vs. Heggie, 86 Ga. 210, 22 Am. St. Rep. 453; Chesapeake, etc., R. Co. vs. American Exch. Bank, 92 Va. 495; Galveston, etc., R. Co. vs. Warnken (Tex. Civ. App. 1896), 35 S. W. Rep. 72; Illinois Cent. R. Co. vs. Peterson, 68 Miss. 454.

"**Confinement for Less than Time Specified in Statute.**—The statute does not have the effect to relieve a carrier from liability for confining cattle for less than twenty-eight hours, without food, water, and rest; but the question whether a confinement for less time is negligent or not remains an open one, to be determined by the jury from the circumstances of each case.

"Exception—'Storm or Other Accidental Causes'—Food and Rest in Car.—By the express provisions of the statute, there is no liability where the carrier is prevented from unloading the cattle by storm or other accidental causes, or where they have proper food, water, space, and opportunity to rest in the cars. In an action under the statute, therefore, the pleadings must aver and the proof show that the case set up was not within these exceptions."—American & Eng. Encyl. of Law, Vol. V, "Carriers of Live Stock," page 443, and cases cited in footnotes 2 and 3.

(11) Galveston, etc., R. Co. vs. Jackson (Tex. Civ. App. 1896), 37 S. W. Rep. 255; Norfolk, etc., R. Co. vs. Harman, 91 Va. 701.

(12) Myrick vs. Michigan Cent. R. Co., 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; Covington Stock-Yards Co. vs. Keith, 139 U. S. 128, 49 Am. & Eng. R. Cas. 154; North Pa. R. Co. vs. Commercial Bank, 123 U. S. 727, 25 Am. & Eng. R. Cas. 556.

See also holdings of state courts for the enforcement of this rule.

or injury to live stock because of the quality or vice of the animal or animals, such quality or vice must be the sole proximate cause of the loss or injury and such as could not have been prevented by the exercise of ordinary care and diligence on the part of the carrier.[13]

The carrier's liability for losses to shipments of live stock does not end with the conclusion of the carriage or even with the delivery of the stock, if it be shown that losses to the live stock occur after delivery which are due to a "cause which began to operate while they were in the carrier's possession" and is a cause for which the carrier is responsible. It is immaterial when the effects develop, if the cause can be traced to the negligence or fault of the carrier.[14]

Carriers of live stock are bound to transport live stock with reasonable despatch, and for a negligent breach of this duty, the carriers are liable for losses caused thereby.[15]

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(13) Toledo, etc., R. Co. vs. Thompson, 71 Ill. 434; Ill. Cent. R. Co. vs. Adams, 42 Ill. 474, 92 Am. Dec. 85; Rhodes vs. Louisville, etc., R. Co., 9 Bush (Ky.) 688; Crow vs. Chicago, etc., R. Co., 57 Mo. App. 135; Conger vs. Hudson River R. Co., 6 Duer (N. Y.) 375; Giblin vs. National S. S. Co., 8 Misc. Rep. (N. Y. Super. Ct.) 22.

(14) Missouri Pac. R. Co. vs. Heath (Tex. 1891), 18 S. W. Rep. 477.

(15) Hunt vs. St. L., I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 61, 62. See also Cincinnati, etc., Ry. Co. vs. Case, 122 Ind. 310, 42 Am. & Eng. R. Cas. 537.

"It has been held that in an action for negligent delay in the transportation of live stock it is proper for the court to refuse to charge the jury that the carrier is not required to move cattle within any particular time or for any particular market. On the other hand, it has been said that if there has been unreasonable delay in a shipment of live stock caused by the negligence of the carrier or by its servants, proximately resulting in loss and damage to the owner, stipulations in the live stock contract that they were not to be transported within any specified time, nor delivered at destination at any particular hour, or in season for any particular market, and to be fed and cared for at the owner's expense, while in the carrier's hand, does not furnish a ground for the carrier for avoidance of liability, for, while not under obligation to transport the live stock to destination in any specified time it was its duty to transport them within a reasonable time, for a negligent breach of which duty it may be held liable for the resulting loss and damage."—Lust's "Loss and Damage Claims," chap. 3, sec. 2, page 52, citing Hunt vs. St. L., I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 61, 62.

But in all cases contributory negligence of the shipper is a good defense.[16]

There are so many elements of risk involved in the transportation of live stock, many of which develop into causes of loss or injury when shipments are delayed in transit, that the courts have a decided tendency to hold carriers of live stock and perishable goods to a prompter schedule of carriage than in the case of ordinary freight, and the reliance of shippers of live stock upon their consignments reaching destination in time for a particular market has been recognized and upheld by the Supreme Court of the United States.[17]

§ 5. Limitation of Carrier's Liability.

Under the provisions of the 1916 Cummins Amendment to the Act to Regulate Commerce all limitations of carrier's liability for the full actual loss or injury to live stock in any receipt, bill of lading, contract, rule, regulation, or provision of a tariff filed with the Interstate Commerce Commission are prohibited, for in the excepting proviso ordinary live stock is specifically excluded.[18]

In those states where statutes have been passed prohibiting limitation of carrier's full common law liability, the requirements apply to shipments of live stock and perishable goods as well as to consignments of ordinary freight. Where the common law rule obtains, carriers of live stock are under the same duties and obligations respecting limitations of their common law liability as pertain to the carriage of other goods.

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[16] Newby vs. Chicago, etc., R. Co., 19 Mo. App. 391; Hutchinson vs. Chicago, etc., R. Co., 37 Minn. 524; Betts vs. Farmers' Loan & Trust Co., 21 Wis. 18, 91 Am. Dec. 460; Lee vs. Raleigh, etc., R. Co., 72 N. Car. 236.

[17] New York, P. & H. R. Co. vs. Peninsula Produce Exch., 240 U. S. 34, 60 L. Ed. —, 36 Sup. Ct. 230.

[18] Act of August 29, 1916, 39 U. S. Stats. at L. 556.

CHAPTER XII

STATE REGULATION OF RAILROADS.

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§ 1. General.

The history of regulation by states of railway carriers is replete with extraordinary legislative and financial assistance in the promotion and construction of railroads within the state, and equally extreme and drastic restrictions over their later development and operations.

To review this history would serve no practical purpose in this volume, and the state relationship with railroads and quasi-public businesses will be considered only in the effect of state regulations of transportation facilities, practices and charges, upon the federal control of interstate transportation. It is essential that the interstate shipper should understand the nature and status of the state railroad commission and where the line of demarcation comes between the authority of national and state governments, the functions performed by state commissions, and the reconciliations of conflicting state and federal powers of regulation of railway carriers.

§ 2. The State Power of Regulation.

For many years after the advent of the steam railroad, the power of the state to regulate and control the construction, operation, and charges of railroad carriers, was seriously questioned. Agitation was rife at all times in favor of it, but conservatism for a long time held the legislatures more or less in check.

We need to consider but one example, previous to 1860, for a summary of the agitation which was to later culminate, first, in federal judicial review of the power of

the state, and, second, in the exercise of the federal power by the passage of the Act to Regulate Commerce.

The state of Georgia built a railroad with state funds and for a while thereafter operated it. The question at once arose whether the charges for the services of the railroad were to be so maintained as to reduce its revenue to the lowest aggregate consistent with its maintenance and operation, in order that the shippers might obtain the benefit of the lowest possible charges for transportation, or whether the road should adjust its rates on business principles to the end, should it prove more than self-supporting, the state might reap its reward for the investment it had made in the construction of the road. The road was allowed to adjust its rates on business principles, and from that time onward the plea of the railroad owner has been the adjustment of his rates on the profit-making plan, as against state or federal determination of the basis of profits.

The power of the state to regulate railroad rates and quasi-public business in general, was first definitely established in the so-called Granger cases, prior to the passage of the Act to Regulate Commerce.[1] The Supreme Court of the United States declared the power of the state could be exercised directly by the legislature in fixing the rates, or that the legislature might delegate such authority to a commission acting as its agent, either in an advisory capacity, or with power to prescribe maximum rates.

§ 3. The Granger Legislation.

Following the close of the Civil War, the building of railroads received its greatest encouragement in the west. The desire of the western farmer for the railroad was intense, and the avidity with which the farmers of the

(1) Munn vs. Ill., 94 U. S. 113, etc.

grain-producing states of the west welcomed the advent of the railway was also responsible for the farmer being made the victim of worthless and disreputable promotion schemes which left him poorer in pocket but richer in experience.

In the great grain states of Minnesota, Wisconsin and Iowa conditions of business demoralization soon followed the construction of the railroads. The carriers sold their land grants at abnormally cheap prices, and an over-development of railroads and an over-production of crops caused two serious conditions—a demoralization of rates and a falling off in the prices of grain.

Public antagonism sprang up and became most acute in these Granger states. Public sentiment held the already demoralized rates of the railroads too high and condemned the discriminations practiced by the carriers. The so-called Granger Laws were passed by the states of Iowa, Wisconsin and Minnesota, prohibiting discriminations, the charging of less for the longer than for the shorter haul, and other disapproved-of practices of the railroads. The great defect in all this legislation was the lack of an instrumentality for enforcing the laws. The Iowa law was repealed in 1876, and the repeal of the other Granger laws soon followed.

But, in the meantime, these laws had been brought before the Supreme Court of the United States, upon the ground that these state statutes regulating rates amounted to a regulation of commerce between the states, which, it was claimed, was an exclusive federal power. The ruling of the Supreme Court was to the effect that railroads were carriers for hire and as such were engaged in public employment affecting the public interests, and were, therefore, subject to legislative control as to their rates of fare and freight, unless protected therefrom by

their charters. Upon the question of state interference with the federal power over the regulation of commerce among the states, the court held that where the railroad was engaged in state as well as interstate transportation, until Congress acted in the exercise of its authority, the state might so regulate such carriers in so far as was necessary to the promotion of the general welfare of the people of the state, despite the fact that such rules and regulations might indirectly affect those without the jurisdiction of the state. In short, it was judicially declared that the power of the state, in its control of domestic commerce, to fix maximum rates subject to judicial determination of their reasonableness, also included the power to make any reasonable regulation for the conduct of the carriers' business, subject alike to judicial determination of what is reasonable.[2]

§ 4. The Exclusive Powers of the State.

It is a common expression used in defining the general power of the state over railroads, to say that the state controls intrastate transportation. To exactly define the power of the state and the jurisdiction within which it may exercise it, it is necessary to determine the relationship of the state and federal powers over commerce. The supremacy of the federal authority over interstate commerce—the commerce between the states—is indisputable and has been since the famous decision in **Gibbons** vs. **Ogden, supra,** but the relationship of the state and federal powers was never clearly determined until 1851, in the **Board of Wardens Case,** in 12 How. (U. S.) 251, 13 L. Ed. 996. In that case, the state's authority over matters of

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(2) "The Granger Cases"—Munn vs. Illinois, 94 U. S. 113, 24 L. Ed. 77; R. Co. vs. Iowa, 94 U. S. 155, 24 L. Ed. 94; Peik vs. Ry. Co., 94 U. S. 164, 24 L. Ed. 87.

commerce was confined to those local and limited matters that are not national in their nature, or admit of only one uniform system of regulation. A further restriction was added to this already narrow rule, in that the exercise of the state authority might obtain during the non-action of Congress, as those matters closely related to or were incidental to the effective and efficient exercise of the federal authority, but the action of Congress in exercise of its authority renders void all state regulations in conflict with it.

The exclusive power of the state may be defined, therefore, as applying to the transportation of shipments performed wholly within the confines of the state, and the business and instrumentalities of carriage of the carrier employed in the conduct of such intrastate transportation As to such jurisdiction, the state authority is exclusive.

For review by the Supreme Court of the United States of state statutes regulating intrastate rates, see—

> I. C. C. vs. C. N. O. & T. P. Ry. Co., 167 U. S. 479, 495; Reagan vs. Trust Co., 154 U. S. 362, 391, 38 L. Ed. 1014, 1021; Smyth vs. Ames, 169 U. S. 466, 42 L. Ed. 819; Chicago, etc., R. Co. vs. Tompkins, 176 U. S. 167, 44 L. Ed. 417; St. L., etc., R. Co. vs. Gill, 156 U. S. 649, 39 L. Ed. 567; Dow vs. Bidelman, 125 U. S. 680, 31 L. Ed. 841; Chicago, G. T. R. Co. vs. Wellman, 143 U. S. 339, 36 L. Ed. 176; Chicago, etc., R. Co. vs. Minn., 134 U. S. 418, 33 L. Ed. 970; Minn. & St. L. R. Co. vs. Minn., 186 U. S. 257, 46 L. Ed. 1151; A. C. L. R. Co. vs. Florida, 203 U. S. 256, 51 L. Ed. 174; Seaboard Air Line vs. Florida, 203 U. S. 261, 51 L. Ed. 176; Prentiss vs. Atlantic G. L., 211 U. S. 210, 53 L. Ed. 150; Maximum Rate Case.

§ 5. Concurrent Power of the State.

In the distinction made by the Supreme Court, in declaring the right of the state to exercise its authority, during

the non-action of Congress, in the regulation of matters of local and domestic effect when necessary in the promotion of the general welfare of the people within the jurisdiction of the state, even though such action may effect those without such jurisdiction, lurks the danger of putting too broad an interpretation upon the language of the court. In fact, later decisions of the same court have more narrowly construed the rule that the federal authority obtains over matters subject only to one uniform plan of regulation, by eliminating the word "only."

There is a concurrent jurisdiction of the state and the federal governments over commerce matters, where it is not the existence of the power in the federal government, but the exercise of such existing power by Congress, that is incompatible with the exercise of such power by the state. Thus, in those kind of commerce cases, until Congress does act and exercise its authority, the state may act in the interests and necessities of its own citizens. In this respect interstate commerce would not be unconstitutionally regulated by the state preceding the action of Congress.

Compare, for the moment, the exclusive power of the state over the construction of highways, turnpikes, railroads and canals, between points within the same state, and their regulation for public use, and it is apparent that without this concurrent power, during the non-action of Congress, the citizens of the state would be without protection the moment the railroad or their traffic passed the boundary line of the state. Such a situation would be incompatible with an efficient regulation, of any nature, by the state. The dual nature of our government, national and state, harmonizes the regulation of commerce within and among the states, but this cannot be realized except through the supremacy of the federal power.

§ 6. Relation of Intrastate and Interstate Rates.

It is well settled that the power of the state to prescribe and regulate rates for the carriage of freight locally within the state is indisputable and it is only where the proper application of those rates operates to the disadvantage or prejudice of an interstate shipper that the federal government's authority to remove discrimination can be exercised.

The question of the potency of the federal Congress' power to control intrastate rates has been recently passed upon by the Supreme Court of the United States in the Shreveport Cases. The Court held that the power to deal with the relation between intrastate and interstate rates lies exclusively with Congress, and in the exercise of that power Congress can remove, directly or through the aid of a subordinate body, a discrimination arising from the relation of intrastate to interstate rates.

It was urged in the Shreveport Cases that it was beyond the power of the Interstate Commerce Commission to correct a discrimination arising out of the relation of intrastate and interstate rates (1) because Congress was impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent unjust discrimination against interstate traffic and (2) that, if it be assumed that Congress has this power, still it has not been exercised or delegated to the Interstate Commerce Commission and hence the action of the Commission in the Shreveport Cases exceeded the limits of the authority which had been conferred upon it.

The Commerce Court sustained the Interstate Commerce Commission's order, and the Supreme Court, in affirming the decree of the Commerce Court, said:

> "Wherever the interstate and intrastate transactions of carriers are so related that the government

of the one involves the control of the other it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme in the national field."[19]

§ 7. State Regulation Effected Under Common Law Rules by State Courts.

The exercise of the exclusive and lawful power of the state over its persons and property does not necessarily

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[19] Houston, etc., Ry. Co. vs. U. S., and T. & P. Ry. Co. vs. U. S., 234 U. S. 342.

See also Shreveport Cases, 205 Fed. 380.

"After quoting section 3 of the Act making unlawful any undue or unreasonable preference or advantage or any undue or unreasonable prejudice or disadvantage, and the proviso of section 1, to the effect that the Act to Regulate Commerce shall not apply to commerce wholly within one state, the court held that the Commission was authorized and empowered to deal with the situation before it in these cases.

"Mr. Justice Hughes, speaking for the court, concluded the decision with these words:

" 'The further objection is made that the prohibition of section 3 is directed against unjust discrimination or undue preference only when it arises from the voluntary act of the carrier and does not relate to acts which are the result of conditions wholly beyond its control. **East Tennessee, etc., Ry. Co.** vs. **Interstate Commerce Commission,** 181 U. S. 1, 18. The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities which are assumed to be binding upon the carriers. The contention is thus merely a repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rates could nullify the lawful exercise of Federal authority. In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement. We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But it was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters, and where the interests of the freedom of interstate commerce are involved the judgment of Congress and of the agencies it lawfully establishes must control.' "—I. C. C. Am. Rep., pp. 29 and 30.

See also Shreveport Cases, 23 I. C. C. 31; Merchants' Exchange of St. Louis vs. B. & O. R. R. Co., 34 I. C. C. 341; Traffic Bureau of the Sioux City Commercial Club vs. American Express Co., 39 I. C. C. 703; Iowa-Dakota Grain vs. Illinois Central R. R. Co., 40 I. C. C. 73.

require that the enforcement of its power in the regulation of relative rights and duties of persons and corporations within its jurisdiction shall only be by statutory mandate or prohibition, but such enforcement may be accomplished under the rules of common law in the courts of the state. In other words, the state has a right to promote the welfare and safety of those within its jurisdiction by requiring carriers to be responsible to the full measure of the loss resulting from their negligence. This simply means that the state's inherent police powers may be invoked against wrongs within the purview of the common law, without resorting to legislative enactment for enforcement of the state's power.

§ 8. Regulation of Railroads Through State Commissions.

Practically coincident with the rise of the Granger agitation, certain of the states were developing other agencies for the scrutiny, and in some cases, for the regulation, of the railroads within their borders. As early as 1844 the state of New Hampshire established a board to inspect the physical condition and operation of its railroads. This was the outgrowth of the general fear that the new methods of transportation were beset with danger. This action was followed during the next quarter of a century by the appointment in Connecticut, Vermont, Maine, and Ohio of similar commissions, to whose duties was here and there added the function previously exercised by temporary boards of arbitration in matters of land appraisal, the award of damages and other disputes that might arise out of the survey and the construction and the operation of railroads. It was in 1869, in Massachusetts, under the leadership of Charles Francis Adams, that these separate functions were definitely combined in a permanent state commission.

One state after another has subsequently appointed such a body, until a commission exists in thirty-nine of the forty-six states of the Union. Their powers, however, are vastly different. The advisory commission is typified by that of Massachusetts, whose duty it is to inspect both the physical operation and financial management of the railroads, to arbitrate disputes as to rates and other differences between the railroad companies and the public, and to make annual reports to the legislature. It is generally admitted that the service of this commission, in bringing matters pertaining to the railroads of its state, by temperate and well-digested reports, into the full light of publicity, has exercised a restraining influence upon the railroads that has been beneficial in the highest degree.

Of the other type of commission, that invested with the authority to prescribe rates and issue rules for the observance of the railroads, a most pronounced type is that of Texas. This commission, from its organization in 1890, has exercised well-nigh despotic power over the railroads of Texas. Between these two extreme types, the powers of the different state commissions vary within wide range, in some states being exercised with discretion, and in others, often with a lamentable disregard of the elementary principles of railroad practice.[20]

Thus the instrumentality created by the state for the exercise of its inherent power of control has been divided into commissions of two distinct types—the advisory commission and the administrative commission. And it is with the latter type of commission, that most of the conflict with federal authority has occurred. Neither type of commission may exercise any power not specifically conferred upon it by the legislature, and since the action of

(20) Railroad Freight Rates, by McPherson, page 241.

the legislature is subject to judicial review as to its constitutionality and reasonableness, so, too, the administrative action of the administrative commission is subject to judicial review as to its reasonableness.

To define the wide range of powers and authority conferred upon these state commissions, is not only impracticable but entirely beyond the scope of this volume, and only the more prominent features of state regulation in their relation to federal control, will be discussed.

§ 9. Foreign Incorporation Does Not Remove Carrier from State Control.

The power of the state which is exclusive,—that is, independent of Congressional action,—is not dependent upon the state or federal incorporation of the carrier. The character of the traffic, as state or interstate, determines the state's jurisdiction. A carrier carrying both classes of traffic is subject to the power of the state and the federal authority respectively. The fact that a carrier is incorporated in a foreign state, in no way interferes with the attachment of another state's jurisdiction while such carrier is engaged in the local and domestic traffic of such state. Nor, on the other hand, does the state incorporation of the carrier in any wise affect the jurisdiction of the Interstate Commerce Commission when such carrier engages in the class of traffic and transportation subject to the Act to Regulate Commerce. Upon the same principle, the United States government takes jurisdiction over Canadian and Mexican carriers, when they engage in interstate commerce within the confines of this country.

§ 10. State Regulation of Federal Chartered Carrier.

Unless Congress, in granting a federal charter to a railroad company, by provision in the charter act, removes

the corporation from state control, such federally incorporated carrier is subject to the state authority in all matters of taxation, rates on state traffic, and reasonable police regulations. "The silence of Congress in this respect, is satisfactory assurance that so far as the corporation should transact business wholly within the state, Congress intended that it should be subjected to the ordinary control exercised by the state over such business."[21] The failure of Congress to express any intention of exempting the carrier from state control, in the chartering act, subjects the carrier to the state authority, and the jurisdiction of the state is in no way based on the acceptance by the carrier of state regulation.

§ 11. State Regulation Not Limited to Rates.

The power of the state to control and regulate its domestic commerce is not restricted to the regulation of carrier's rates alone, but may embrace the prohibition of discriminations, the requirement of facilities for the interchange of freight at railroad connections, the reasonableness of contracts of the carriers, either between the carrier and its patrons, or between the carriers for transportation arrangements, and the prohibition of the consolidation of parallel or competing lines of railway. Thus, the state may require the carrier to construct and maintain suitable depots and stations along its line for the proper and safe accommodation of passengers and property.

§ 12. State Regulation as Violative of Property Rights of the Carrier.

In their constant resistance against the increasing exercise of state regulation, the carriers have insistently assailed the power of the state on the ground that it

(21) Reagan vs. Trust Co., **supra.**

operates as an impairment of the property rights of the railroad and is violative of due process of law and the equal protection of the laws, as secured by the federal constitution. Thus, where the carrier received its charter from the state, and that charter vested certain rights in the carrier which the state subsequently attempted to modify, the state is possessed of the power to modify the terms of the charter, but it may not, by any subsequent legislation, impair or annul vested rights in property or contract acquired by user of corporate powers and franchises. It is upon this principle that the defense is often set up by the carrier that the action of the state commission, in reducing its rates, is an impairment of its property rights acquired by it under its charter contract with the state, in that its rate is one of its property rights. It is also in recognition of this principle, that the court declared regulations reducing rates below a certain (intangible) point, confiscatory of the carrier's property which he has acquired under the use of his corporate power and franchise.

§ 13. Regulation Orders of State Commission Are Not Judicial.

In some states, the legislature, in creating its railroad commission, has seen fit to style such body a court and to constitute it a court of record, and has further lodged power in its state supreme court to review the action of the commission and fix rates for the future. It is immaterial whether the commission, or other body charged with the duty of making rates, is so styled a court; its orders are purely legislative, not judicial; neither is its decision fixing rates, or approving existing rates, sufficient to make the legality of such rates res adjudicata. (**Prentiss** vs. **A. C. L. R. Co.**, 211 U. S. 210, 53 L. Ed. 150.)

When the commission fixes a rate it is making a rule for the future, and exercises only its legislative power delegated to it by the legislature, nor does the supreme court on review of the commission's action, when it fixes a rate, exercise more than a legislative and administrative function.

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. It follows, that when a state supreme court is vested with the rate making power on appeal from such a commission, its action is essentially administrative or legislative, and not judicial, and, therefore, is not constituted an adjudication in the judicial sense of the word."

§ 14. State May Not Regulate Interstate Rate or Any Part Thereof.

A state can exercise no control or regulation over an interstate rate or the portion of such rate which may be within the state limits.

Thus in a state whose statute forbids a lesser charge for the longer than the shorter haul over the same line, if the shorter haul be included wholly within the state, but the longer haul passes beyond the boundary of the state, the state may not act as to the shorter haul rate, because to do so would involve the adjustment of the longer haul rate, which would be an interference with interstate commerce. The state may not cause the adjustment of a carrier's interstate rates within the state by its regulation of local rates that are component parts of interstate rates. This latter view was upheld in the Minnesota Rate

Case,[22] but an opposite view was taken by the court in a Kentucky case.[23] Recently the Commission has adhered to the ruling in the Kentucky case. The theory of the Commission is that any reasonable, nonconfiscatory regulation of the local state rates, even though through competitive necessity the reduction of the intrastate rates causes the carrier to reduce its interstate rates, is within the power of the state, and is entirely consistent with the provision of the first section of the Act to Regulate Commerce that it shall not apply to the transportation of persons or property wholly within a state. This seems the logical and preponderant view of the courts on the question.

§ 15. State Statutes in Conflict with Act to Regulate Commerce Are Unconstitutional and Void.

The provisions of the Act to Regulate Commerce supersede and abrogate all conflicting state statutes and general laws.[24] The power of the federal government to regulate interstate commerce is too well established to be open to question, and all local regulations, private contracts, terms of franchises, or charters must give way when they conflict with federal regulation duly prescribed by Congress.[25] An order of the public service commission of a state directly interfering with or directly regulating interstate commerce is not merely erroneous, but it is absolutely void.[26] And where a state public service commission or

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(22) Shepard vs. N. P. R. Co., 184 Fed. 765.

(23) L. & N. R. Co. vs. Siler, 186 Fed. Rep. 176.

For limitations of state authority over interstate rates, see L. & N. R. Co. vs. Ky., 183 U. S. 503, 46 L. Ed. 298; L. & N. R. Co. vs. Eubank, 184 U. S. 27, 46 L. Ed. 416.

(24) McNeill vs. S. R. Co., 202 U. S. 543, 50 L. Ed. 1142; T. & P. R. Co. vs. Mugg, 202 U. S. 242, 50 L. Ed. 1101; G. C. & S. F. R. Co. vs. Hefley, 158 U. S. 98, 39 L. Ed. 910.

(25) Am. Bkrs. Assn. vs. Am. Exp. Co., 15 I. C. C. R. 15, 21.

(26) Delaware & C. R. Co. vs. Stevens, 172 Fed. Rep. 595.

other body possessing legislative authority with executive power to put its acts into effect, enacts an unconstitutional rule or order, it may be enjoined by the courts from enforcing it.[27] Congress, having been given sole jurisdiction over, and the right to regulate interstate commerce, and having created the Interstate Commerce Commission as a tribunal for that purpose, the states have no power or jurisdiction to directly interfere with or directly regulate the same by public service commissions or otherwise. It has been held that a state statute making it unlawful for a railroad to charge a greater sum than that specified in the bill of lading was unconstitutional, as applied to an interstate shipment, because in conflict with the Interstate Commerce Act, where the rate charged was that filed in accordance with the Act, although greater than that specified in the bill of lading.[28]

§ 16. State Commission May Be Party to Proceedings Before Interstate Commerce Commission.

The members of a state railway commission are proper parties complainant in proceedings before the Interstate Commerce Commission.[29]

The Interstate Commerce Commission is empowered by the Act to investigate any complaint forwarded by the railroad commissioner or railroad commission of any state or territory at the request of such commissioner or commission.[30]

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(27) Same case, 172 Fed. Rep. 595.

(28) G. C. & S. F. R. Co. vs. Hefley, 158 U. S. 98, 39 L. Ed. 152; see also St. Louis & C. R. Co. vs. Arkansas, 217 U. S. 136, 54 L. Ed. —; International Text Book Co. vs. Pigg, 217 U. S. 91, 54 L. Ed. —.

(29) Trammell vs. Clyde S. S. Co., 5 I. C. C. R. 324, 4 I. C. C. 120.

(30) Act to Reg. Com. (as amended), sec. 13.

§ 17. State Rates.

(1) **As Standards in Fixing Interstate Rates.** While a rate fixed by a state statute or a state commission is naturally and properly entitled to respectful consideration, it has no greater sanctity, as applied to interstate traffic, than a rate established by a railroad company, and the Interstate Commerce Commission does not hesitate, upon proper evidence that a rate so established would be unjust either to a carrier or to a shipper, to refuse to accept it as a basis for fixing an interstate rate.[31] Upon general principles of comity, the action of a state commission in fixing a rate on state traffic must be treated with all due respect, but the Interstate Commerce Commission has never felt itself bound to accept a state-made rate as a necessary measure of an interstate rate.[32]

There are many reasons, however, why state and interstate rates should be established in harmony with one another. When the Commission is asked to examine the reasonableness of an interstate rate, similar rates, established by state authority in that territory, must have great influence, especially when they have been acquiesced in by carriers. Still these state rates have no binding force upon the Commission. They are standards of comparison of greater or less value, according as they appear to be just and reasonable.[33]

(2) **Must Be Posted and Filed When Used as Part of Through Interstate Rate.** Rates for through shipments are often made by adding together two or more rates. All state or other rates used in combination for interstate shipments must be posted at points from which they apply

(31) Hope Cotton Oil Co. vs. T. & P. R. Co., 12 I. C. C. R. 265, 269.
(32) Saunders et al. vs. So. Ex. Co., 18 I. C. C. R. 415, 421.
(33) Corn Belt Meat Prodrs. Assn. vs. C., B. & Q. R. Co. et al., 14 I. C. C. R. 376; see also Waco Frt. Bu. vs. H. & T. C. R. Co., 19 I. C. C. R. 22, 24; Cobb et al. vs. N. P. R. Co. et al., 20 I. C. C. R. 100, 102.

and filed with the Interstate Commerce Commission, and can only be changed as to such traffic in accordance with the terms of the Act to Regulate Commerce.[34]

Rates not on file with the Commission cannot be used in constructing a through charge.[35]

Each carrier, forming part of a through interstate line, though operating wholly within a state, must file the schedule of rates applying over its line as a portion of such through line in the movement of interstate traffic, in accordance with the provisions of the Act to Regulate Commerce.[36]

Unless a state rate is filed with the Commission, it may not be lawfully applied in combination with other rates to apply on the through movement of interstate traffic.

§ 18. State Laws Affecting Contractual Relationship of Shippers and Carriers.

A state statute, of constitutional competency, may regulate and control the contracts between shippers and carriers, or between carriers dealing with transportation arrangements, but if a federal statute operates upon the same subject and prescribes different rules, and the federal statute is within the constitutional power of Congress to enact, the state statute is superseded and abrogated thereby.

Thus a state statute, declaring it unlawful for a carrier in that state to charge and collect a greater sum for transporting freight than is specified in the bill of lading, when applied to interstate shipments, is void as in conflict with the Act to Regulate Commerce, which provides that

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(34) From Rule 13, Tariff Circular 18-A, of I. C. C., p. 33.

(35) Hagar Iron Co. vs. Penna. R. Co. et al., 18 I. C. C. R. 529; see also In the Matter of Export Rates from East and West of the Mississippi River, 8 I. C. C. R. 185.

(36) Re Export Rates on Corn, etc., 8 I. C. C. R. 185.

the carrier must charge and collect only its legally published tariff rates on file with the Interstate Commerce Commission.[37]

§ 19. State Without Authority Over Terminal Services and Charges in Connection with Interstate Traffic.

The jurisdiction of the state is always determinable by the character of the service, instead of the geographical location of the means of transportation. So, an interstate shipment retains its interstate character until actual delivery is made into the possession of the consignee. The control of interstate commerce by the federal authority extends to and includes all services necessary or incidental to its transportation and final delivery,[38] such as the necessary handling and delivery at terminal points.[39]

A state statute imposing penalties for unjust discriminations in the furnishing of terminal facilities, is of no effect upon interstate traffic, because such a statute would be in interference with the Act to Regulate Commerce which provides for the furnishing of such facilities.[40]

So, too, a statute of a state requiring a carrier to place cars containing interstate freight upon the consignee's siding for unloading, is void and in interference with the Act to Regulate Commerce.[41]

A state statute penalizing the failure of a carrier to furnish cars to a shipper within a certain time, after the shipper's request therefor in writing, in the sum of twenty-five dollars per day for each car not so furnished, when applied to interstate traffic, is an unconstitutional regulation of interstate commerce.[42]

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(37) G. C. & S. F. R. Co. vs. Hefley, 158 U. S. 98, 39 L. Ed. 910.
(38) State vs. Atchison, etc., R. Co., 176 Mo. 687, 75 S. W. 776.
(39) Fielder vs. M., K. & T. R. Co., 42 S. W. 362.
(40) Fielder vs. M., K. & T. R. Co., 42 S. W. 362.
(41) McNeill vs. So. R. Co., 202 U. S. 543, 50 L. Ed. 1142.
(42) Houston & T. C. R. Co. vs. Mayes, 201 U. S. 321, 50 L. Ed. 772.

A state may not compel a carrier of interstate shipments of live stock to transfer such cars of live stock to a connecting road at a point of connection within the state, because in interference with interstate commerce regulations of the Act to Regulate Commerce.[43]

While a state in the exercise of its police power may confer power on an administrative agency to make reasonable regulations as to the place, time and manner of delivery of merchandise moving in channels of interstate commerce, any regulation which indirectly burdens interstate commerce is a regulation thereof and repugnant to the federal Constitution. An order of the North Carolina Corporation Commission, requiring a railway company to deliver cars from another state to the consignee on a private siding beyond its own right of way, was held to be a burden on interstate commerce and void.[44]

§ 20. Long-and-Short-Haul Provision of State Statute Not Applicable to Interstate Traffic.

The state constitution of Kentucky prohibits common carriers from charging more for a shorter than for a longer haul, but so far as its provisions attempt to extend to a long haul from a place outside of, to one within the state, and the shorter haul between points within the state, on the same line and in the same direction, thus compelling the carrier to adjust, regulate or fix his interstate rates with some reference to his rates within the state, such prohibition is unconstitutional in such latter respect, and void in interference with interstate commerce as regulated by the Act to Regulate Commerce.[45]

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(43) Central Stock Yards Co. vs. L. & N. R. Co., 118 Fed. Rep. 113, affirmed in 192 U. S. 568, 48 L. Ed. 565.
(44) McNeill vs. So. R. Co., 202 U. S. 543, 50 L. Ed. 1142.
(45) L. & N. R. Co. vs. Eubank, 184 U. S. 27, 46 L. Ed. 416.

§ 21. State Demurrage Rules and Regulations Not Applicable to Interstate Traffic.

On March 16, 1908, the Commission decided that demurrage rules and charges applicable to interstate shipments are governed by the Act to Regulate Commerce, and therefore are within its jurisdiction and not within the jurisdiction of state authorities. Any other view would open a wide door for the use of such rules and charges to effect the discriminations which the Act prohibits.

Demurrage rules and charges must be observed as strictly as transportation rules and charges. The Commission cannot, therefore, recognize as lawful any rule governing demurrage the application of which is dependent upon the judgment or discretion of some person, or which provides for exemption therefrom in certain exigencies in the creation of which the carrier has no part.[46]

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[46] Conf. Rulings Bull. No. 5, Ruling No. 223-(b)-(c), May 12, 1908, page 74.

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